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No. 10-288

In The
# Supreme Court of the United States

HILTON HALL,

*Petitioner,*

v.

JAMES RAY WARD,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's decision was a misapplication of 28 U.S.C. § 2254(e)(1) when it failed to give any deference to the state habeas court's factual findings on Petitioner's juror/bailiff misconduct claim which were clearly supported by the record.

2. Whether the Eleventh Circuit's finding of prejudice conflicts with *United States v. Frady*, 456 U.S. 152 (1982), when the court agreed Petitioner had failed to establish that the trial court did not answer any question posed by the jury and when it disregarded the factual findings of the state habeas court that any information provided to the jury was not reversible error.

3. Whether the Eleventh Circuit's decision which relied on evidence that was not admitted, including testimony relating to the thought processes of the jurors, in assessing prejudice and harm directly conflicts with *Mattox v. United States*, 146 U.S. 140, 149 (1892), and *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009).

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## CITATION TO THE OPINION BELOW

The Georgia Supreme Court opinion is reported at *Ward v. State*, 262 Ga. 293, 417 S.E.2d 130 (1992). The state habeas court denied Petitioner's petition on August 27, 1998. (*See* Appendix 169-190). Following a remand for clarification from the Georgia Supreme Court, the state habeas court entered a second clarifying order denying relief on December 20, 2002. (*See* Appendix 164-168). The Georgia Supreme Court denied Petitioner's Application for a Certificate of Probable Cause to Appeal on April 30, 2003.

On August 15, 2005, the federal habeas court found Petitioner's claim of improper bailiff/juror communications to be procedurally defaulted. (*See* Appendix 121-128). On June 29, 2007, without further addressing Petitioner's bailiff/juror communication claim, the federal habeas court denied Petitioner federal habeas corpus relief. The Eleventh Circuit Court of Appeals granted sentencing phase habeas relief on January 4, 2010, which is reported at *Ward v. Hall*, 592 F.3d 1144 (2010), (*See* Appendix 1-92), and denied Respondent's petition for rehearing *en banc* on May 27, 2010. (Appendix 191-192).

## STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006). The Eleventh Circuit entered its judgment on January 4, 2010, and denied Respondent

Hall's timely Request for Rehearing or for Rehearing *En Banc* on May 27, 2010.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment, through the Fourteenth Amendment's Due Process Clause, concerning a defendant's right to a fair trial by impartial jurors.

This case also involves 28 U.S.C. § 2254, which provides:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

## STATEMENT OF THE CASE

On July 12, 1991, James Ray Ward was convicted of the murder of Nikia Gilbreath, the kidnapping with bodily injury of Nikia Gilbreath, and feticide. The Georgia Supreme Court affirmed Petitioner's convictions and sentences. *Ward v. State*, 262 Ga. 293, 417 S.E.2d 130 (1992).

The state habeas court denied Petitioner's petition for habeas corpus relief on August 27, 1998, and following remand from the Georgia Supreme Court entered a second order denying relief on December 20, 2002. Petitioner filed an Application for a Certificate of Probable Cause to Appeal with the Georgia Supreme Court, which was denied on April 30, 2003.

On June 29, 2007, the district court denied Petitioner federal habeas corpus relief. The Eleventh Circuit Court of Appeals granted sentencing phase habeas relief on January 4, 2010. *Ward v. Hall*, 592 F.3d 1144 (2010). On May 27, 2010, the Eleventh Circuit denied Respondent's Request for Rehearing or for Rehearing *En Banc*.

## STATEMENT OF THE FACTS

In reversing the state habeas court's finding of procedural default, the Eleventh Circuit wholly disregarded 28 U.S.C. § 2254(e)(1) in erroneously finding actual prejudice and granting sentencing phase relief to Petitioner. The Eleventh Circuit found, based on the thought processes of the jurors during deliberations, that Petitioner had established that "there is reasonable likelihood the improper bailiff-jury communication affected Ward's constitutional due process right to a fair penalty phase hearing and a reliable sentence." *Ward v. Hall*, 592 F.3d at 1181. This finding noted, but disregarded, the fact that the state habeas court had not allowed development of the

claim by either party. The finding also ignored the clear evidence before the jury establishing Petitioner's guilt, and the aggravating evidence, statutory and nonstatutory, including Petitioner's history of stalking and violently attacking women.[1] The record also showed that Petitioner had committed an almost identical crime, five months after the death of Nikia Gilbreath. Petitioner was later convicted in Gordon County of the rape of Donna Rich and pled guilty in Floyd County to the kidnapping and rape of Ms. Rich.

Ms. Rich also testified that Petitioner told her that he had killed two people and pointed out a "good place" to "dump bodies."

Further, in Petitioner's home, detectives found notes, handwritten by Petitioner, one of which contained precise directions to the Gilbreath home with a description of Nikia and the comment "fine looking." Also found at Petitioner's home were: a quilted bedspread from the Gilbreath home; a baby blanket from the Gilbreath home; and a bathing suit bottom, which had been owned by Nikia Gilbreath.

Petitioner told the investigating agents, "I don't know if I done anything to [Nikia Gilbreath] or not, I could have done it, and I could not have done it." Petitioner also stated, "I have been a liar all of my

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[1] Anna Wallin testified that Petitioner had come to her house unexpectedly to allegedly check on her well, just as Petitioner had done at the Gilbreath's, and thereafter, she received harassing phone calls.

life, I need some help, if I done it, I didn't mean for it to happen and I am sorry." Further, while in jail awaiting trial, Petitioner wrote a letter to a friend and asked him to testify to a false alibi, offering to pay the friend $500.00.

The Eleventh Circuit relied on an undeveloped record and testimony that was not allowed in the state courts and ignored the mandates of § 2254 in erroneously concluding that any communication to the jury that they had to rely on the trial court's prior instructions denied Petitioner a fair and reliable sentence.

## HOW THE FEDERAL ISSUES WERE RAISED AND RESOLVED BELOW

In the state habeas proceedings, Petitioner alleged for the first time that a bailiff improperly answered a juror's question concerning the possibility of parole during sentencing phase deliberations. The state habeas court found that Petitioner's claim was procedurally defaulted under Georgia law, (O.C.G.A. § 9-14-48(d)), as it could have been raised on direct appeal and Petitioner had failed to establish cause and prejudice or a miscarriage of justice to overcome that default. (Appendix 174-176). The Georgia Supreme Court denied Petitioner's application to appeal.

The federal habeas court held that the state habeas court had properly determined that Petitioner's

juror/bailiff misconduct claim was procedurally defaulted. (*See* Appendix 121-128).

On appeal, the Eleventh Circuit Court of Appeals held that the state habeas court should have considered the affidavits and then concluded Petitioner had established cause and prejudice to overcome his default. *Ward v. Hall*, 592 F.3d at 1173-1181.

## REASONS FOR GRANTING THE WRIT

Although concluding that Petitioner had failed to establish by clear and convincing evidence the basis of his claim, the Eleventh Circuit nevertheless disregarded 28 U.S.C. § 2254(e)(1) and *United States v. Frady*, 456 U.S. 152 (1982), and improperly concluded that Petitioner had established cause and prejudice to overcome his default of his juror/bailiff misconduct claim. This alarming trend of the evisceration of the AEDPA and its policies should not be countenanced.

The Eleventh Circuit based its findings of prejudice and granting of sentencing phase relief on the testimony and thought processes of three of Petitioner's trial jurors, which, as even noted by the Eleventh Circuit, were not in evidence before the state habeas court and on a record that had not been developed in the Court below. By basing its decision on this testimony that was not admitted and not admissible, the Eleventh Circuit's holding is in direct conflict with the opinions of this Court and other Circuit Courts of Appeals. Accordingly, this Court

should grant certiorari review to conduct a proper cause and prejudice analysis based on the evidence in the record.

## I. This Court Should Grant Certiorari Review To Correct The Eleventh Circuit's Misapplication Of 28 U.S.C. § 2254(e)(1) In Failing To Give The Mandated Deference To The State Habeas Court's Factual Findings.

Although the Eleventh Circuit even repeatedly noted that the record is unclear as to what occurred in the proceedings below, it is clear the circuit court improperly applied 28 U.S.C. § 2254(e)(1) in concluding that Petitioner had overcome the state habeas court's deferential finding that he had procedurally defaulted his improper bailiff/juror communication claim by clear and convincing evidence.

Following an evidentiary hearing, the state habeas court found that trial counsel could have raised the claim that the bailiff improperly informed the jury that they could not consider life without parole as a sentencing option just as state habeas counsel subsequently raised the claim.[2] In this regard, the

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[2] O.C.G.A. § 17-10-16(a) states "a person who is convicted of an *offense committed after May 1, 1993*, for which the death penalty may be imposed under the laws of this State may be sentenced to death, imprisonment for life without parole, or life imprisonment as provided in Article II of this Chapter."

(Continued on following page)

record shows that following the trial, counsel spoke with several of the jurors. Following these conversations, counsel did not raise the issue of improper communications between the bailiffs and the jurors on appeal.

Instead, Petitioner waited until his state habeas proceedings to raise this claim and in support proffered three affidavits. The live testimony of one of those three affiants was also proffered. Notably, in reviewing these affidavits as the basis for their grant of relief, the Eleventh Circuit found that the state habeas court made it clear that it was not considering juror testimony on the issue as it found it was inadmissible under Georgia law. *Ward v. Hall*, 592 F.3d at 1174-1175.

The state habeas court further found that Petitioner had failed to establish that there was any question not answered by the trial court and had failed to establish actual prejudice resulting from any conduct of the bailiffs. (Appendix 166-167). This finding was supported by the evidence that showed that the only question possibly asked by the jurors was whether there was the possibility of life without parole. The evidence showed that the bailiff took the jurors' question to the judge for the judge's response. The bailiff then returned from the judge to give the jurors the judge's response that the jury had to

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(Emphasis added). Petitioner committed the murders in this case in 1989.

proceed with the instructions previously given to them by the trial court, which was a correct statement of law and a correct procedure under Georgia law.

### A. Presumption Is That The Trial Court Answered Any Question Posed By The Jury

Disregarding the fact that the record was undeveloped on the issue and that the state habeas court had refused to allow development on the issue, the Eleventh Circuit found that Petitioner had established by clear and convincing evidence as required by 28 U.S.C. § 2254(e)(1) that the jury gave a question to the bailiff concerning parole. Even assuming Petitioner established by clear and convincing evidence that the jury gave the bailiff a question concerning parole, the Eleventh Circuit did not take into account that Petitioner did not overcome by clear and convincing evidence the fundamental point of his claim: that the state habeas court found that the trial court, via the bailiff, informed the jury that they were to rely on the trial court's prior instructions, which was not an improper procedure under Georgia law. Significantly, the Eleventh Circuit even conceded that Petitioner had not established by clear and convincing evidence that the trial judge, not the bailiff, gave the information to the jury in response to any question about parole. The Eleventh Circuit specifically held that the record is "unclear whether the bailiff's answer was dictated by the trial court or was

merely a response from the bailiff." *Ward v. Hall*, 592 F.3d 1144, 1177 (2010).

Under § 2254(e)(1), the Eleventh Circuit was required to presume to be correct any determinations of factual issues made by the state courts. A habeas corpus petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).[3] *See Bradshaw v. Richey*, 546 U.S. 74, 79-80 (2005). Accordingly, the Eleventh Circuit erred in not presuming, as found by the state habeas court, that the trial court, through the bailiff, answered any question posed by the jury concerning the possibility of parole.

In fact, although the Eleventh Circuit correctly noted that Juror Dunsmore, one of the three jurors on whose testimony the Eleventh Circuit relied, did not say he saw the bailiff take the particular question concerning parole to the trial court, (*Ward v. Hall*, 592 F.3d at 1177, fn. 16), the record shows that Juror Dunsmore could recall the jury asking *only this one question*. Juror Dunsmore specifically testified in the state habeas proceedings regarding how many questions were asked, "I would say at least one, but *I don't remember any more than one*." (Emphasis added). Mr. Dunsmore testified that "one occasion we saw [the

[3] 28 U.S.C. § 2254(d)(2) does not apply to Petitioner's claim as Petitioner's claim was not "adjudicated on the merits" in the state habeas proceedings, but found to be procedurally barred from review.

bailiff] actually go to the Judge's room and give him the question and came back from it. They had told us that they had gotten the answer from the Judge." Thus, the reasonable conclusion being that any parole question that was asked by the jury was taken to the trial judge and answered by the court. Moreover, Juror Dunsmore testified that he could not say parole was not simply a question discussed among jurors and not asked of the bailiff.

### B. The Trial Court's Response Was Proper

In further misapplying 28 U.S.C. § 2254(e)(1), the Eleventh Circuit refused to give the proper presumption to the state habeas court's findings concerning state law and the facts found by the state court that the information given to the jury regarding parole was proper.

In denying relief, the state habeas court found that Petitioner had failed to show that he was prejudiced by the communication between the bailiff and the jury. (Appendix 166-167, 174-176). In erroneously concluding that Petitioner had established actual prejudice to overcome his default of this claim, the Eleventh Circuit relied on two Georgia Supreme Court cases: *Quick v. State*, 256 Ga. 780, 353 S.E.2d 497 (1987) and *Turpin v. Todd*, 271 Ga. 386, 519 S.E.2d 678 (1999). However, the Eleventh Circuit disregarded well-substantiated Georgia law that it is not harmful error, or even a jury charge, if the bailiff

under instruction of the trial court merely informs the jury that they must proceed under the instructions previously given by the trial court. *See Turpin v. Todd*, 271 Ga. at 391, 519 S.E.2d at 683 (1999); *Potts v. State*, 261 Ga. 716, 725, 410 S.E.2d 89, 97 (1991); *Cohen v. State*, 257 Ga. 544, 546-547, 361 S.E.2d 373, 375 (1987); *Quick v. State*, 256 Ga. 780, 786-787, 353 S.E.2d 497, 502-503 (1987); *Childs v. State*, 257 Ga. 243, 256-257, 357 S.E.2d 48, 60-61 (1987); *Thacker v. State*, 226 Ga. 170, 180-181, 173 S.E.2d 186, 193-194 (1970); *Berryhill v. State*, 235 Ga. 549, 554, 221 S.E.2d 185, 189 (1975).

Instead, the Eleventh Circuit, again relying on the affidavits and testimony of the jurors that were not admitted, repeatedly found that the jury was informed that "life without parole was not an option." *Ward v. Hall*, 592 F.3d at 1179, 1180. However, a review of the record shows that the record, again, is undeveloped on exactly what the jurors were told.

The record does support the state habeas court's finding that Petitioner failed to establish actual prejudice; however, the Eleventh Circuit neglected to give the state court's finding proper deference. Juror Craig testified by affidavit that the bailiff informed them that **they had to go on the instructions given by the trial court**. Another juror, Juror Dunsmore, initially stated in his affidavit drafted by state habeas counsel that the bailiff informed him that parole "was not an option"; however, at the state habeas hearing when testifying in his own words and upon examination by both parties, Juror Dunsmore

could not remember what was discussed or who was asked the question about parole, thereby undermining his prior affidavit testimony. Contrary to the Eleventh Circuit's holding, the only unrebutted testimony is that of Juror Craig who testified that the jury was informed that **they had to go on the instructions previously given by the trial court**.

Nevertheless, the Eleventh Circuit chose to rely on the internally contradictory testimony of Juror Craig that they were informed that parole was not an option, which is in contravention of § 2254(e)(1) as it does not give proper deference to the state habeas court's findings. This handpicking of specific facts to overcome the state habeas court's supported factual finding is clearly not a proper application of § 2254(e)(1).

Further, the Eleventh Circuit disregarded the fact that under Georgia law a trial court informing the jury, even through a bailiff, that the jury must rely on the instructions previously given by the trial court is not reversible error. In *Turpin v. Todd*, *supra*, which was relied on by the Eleventh Circuit as support for its finding of prejudice, the Georgia Supreme Court held, "a finding of harmless error is appropriate where the bailiff merely repeated what the trial court had instructed the bailiff to tell the jury. . . ." *Turpin v. Todd*, 271 Ga. at 391, 519 S.E.2d at 683. *See also Potts v. State*, 261 Ga. at 725, 410 S.E.2d at 97 (trial court did not commit reversible error by declining to answer the jury's questions about the possibility of parole); *Cohen v. State*, 257 Ga. at

546-547, 361 S.E.2d at 375 (trial court did not err by refusing to answer the jury's request for a definition of "life imprisonment in terms of years in prison," or by responding that the jury was "bound" by the charge that had been given and that such was "the law of this state.") *Citing Quick v. State*, 256 Ga. at 786-787, 353 S.E.2d at 502-503; *Childs v. State*, 257 Ga. at 256-257, 357 S.E.2d at 60-61; *Thacker v. State*, 226 Ga. at 180-181, 173 S.E.2d at 193-194 (no harm and not a charge when judge told the bailiff to tell the jury, "that he could tell them nothing about parole").

In *Berryhill v. State*, 235 Ga. at 554, 221 S.E.2d at 189, the Georgia Supreme Court held:

> The communication in issue consisted of a question sent by the jurors to the trial judge and transmitted by the bailiff during the sentencing deliberations. They wondered "if they could sentence appellant to a life sentence without any possibility of parole?" The trial judge instructed the bailiff to inform the jurors that the court could not answer that question. Although all communications with the jury are to be discouraged except in open court with all persons present, the communication here did not amount to an instruction or charge to the jury and no reversible error is shown.

It is clear that the Eleventh Circuit failed to give the mandated presumption under § 2254(e)(1) to the state habeas court's factual findings that the trial court properly answered any question by the jury

concerning parole. Accordingly, this Court should grant certiorari review for a proper analysis, which would require reinstatement of Petitioner's sentence.

## II. This Court Should Grant Certiorari Review As The Eleventh Circuit's Consideration Of The Thought Processes Of The Jurors To Find Prejudice Is In Direct Contravention Of This Court's Precedent And The Precedent Of Other Circuit Courts.

Pretermitting the fact that the state habeas court held that it was not admitting into evidence or considering the testimony of the jurors for its review, in finding prejudice and resulting harm, the Eleventh Circuit Court relied on those affidavits, the undeveloped testimony and the inadmissible thought processes of those jurors. *Ward v. Hall*, 592 F.3d 1173-1174, 1179.[4] This analysis is in direct contravention of United States Supreme Court precedent, and the precedent of other circuit courts.

Federal Rules 606(b) states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations **or to the effect of anything upon that or any other juror's mind or emotions as**

[4] The Court also relied on pure speculative testimony to support its prejudice analysis. (*Ward v. Hall*, 592 F.3d 1173-1174).

> **influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith**. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror . . . A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

(Emphasis added).

Moreover, this Court has held, and the circuit courts agree, that a "'juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although **not as to how far that influence operated upon his mind**.' *Mattox v. United States*, 146 U.S. 140, 149, 13 S. Ct. 50, 53, 36 L. Ed. 917 (1892)." *Llewellyn v. Stynchcombe*, 609 F.2d 194, 196 (5th Cir. 1980) (emphasis added), *citing Remmer v. United States*, 347 U.S. 227 at 229 (1954); *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir. 1977) ("Inquiries that seek to probe the mental processes of jurors, however, are impermissible."). *See also United States v. Hornung*, 848 F.2d 1040, 1046 (10th Cir. 1988); *United States ex rel. Owen v. McMann*, 435 F.2d 813, 819-820 (2nd Cir. 1970); *Williams v. Price*, 343 F.3d 223, 232 (3rd Cir. 2003); *Robinson v. Polk*, 438 F.3d 350, 360 (4th Cir. 2006); *United States v. Gonzales*, 227 F.3d 520, 524 (6th Cir. 2000); *United States v. Williams*, 613 F.2d

573, 575-576 (5th Cir. 1980); *United States v. Siegelman*, 561 F.3d 1215, 1240 (11th Cir. 2009). Disregarding this precedent, the Eleventh Circuit based its finding of prejudice on the testimony of jurors about their thought processes during deliberations that was not admitted in the state court proceedings.

Further, the Eleventh Circuit improperly found harm based on its conclusion that the bailiff left the impression with the jury that Petitioner would be released on parole if the jury sentenced Petitioner to life. *Ward v. Hall*, 592 F.3d at 1179. Further, this improperly premised conclusion as to what the jurors' impression of the information given to them meant was extrapolated and speculated from the appellate court's non-deferential finding that the jury was told by the bailiff that "life without parole was not an option." *Ward v. Hall*, 592 F.3d at 1179, 1180. As set forth above, this conclusion is rebutted by the juror testimony that the jury was properly informed by the trial court, through the bailiff, that they had to go on the prior instructions of the trial court. This Court should grant certiorari, not attempt to discern what the jury's thought processes were, give the state court's factual findings proper presumption under § 2254(e)(1) and *Frady*, and reverse the Eleventh Circuit's grant of relief.

## III. This Court Should Grant Certiorari Review As The Eleventh Circuit's Decision Rests On A Misapplication Of 28 U.S.C. § 2254(e)(1) In Finding Petitioner Had Established Prejudice Under *Frady*.

In conducting its prejudice analysis, the Eleventh Circuit recognized this Court's holding in *United States v. Frady*, 456 U.S. 152 (1982), as follows:

> Ward must still demonstrate actual prejudice. *See Jefferson*, 570 F.3d at 1309. . . . In *Frady*, the Court found no actual prejudice because there was "no substantial likelihood" that the jury would have found the defendant guilty of manslaughter instead of first degree murder "if only the malice instructions had been better framed[.]" *Id.* at 172, 102 S. Ct. at 1596. **Moreover, "even if the law presumes prejudice for certain errors when they are timely raised, a convicted defendant who is seeking to overcome a procedural bar does not have the benefit of that presumption of prejudice, and must instead meet the actual prejudice test set forth in *Frady*."**

*Ward v. Hall*, 592 F.3d at 1178. (Emphasis added).

The Court then addressed the testimony of the jurors that was not admitted and the jurors' thought processes from that testimony and held that prejudice had been established because the jurors had considered that life without parole "was not an option." *Id.* As set forth above, giving the proper presumption

under § 2254(e)(1), Petitioner did not show that the communication did not come from the trial court or that the communication was improper.[5] Giving the proper presumption under § 2254, the court should have determined that Petitioner did not establish the *Frady* prejudice to overcome his default of this claim.

The Eleventh Circuit reasoned that Petitioner had established actual prejudice under *Frady* as the "jury was not supposed to be considering parole in the first place." *Ward v. Hall*, 592 F.3d 1180. However, this reliance on the internal processes of the jury during deliberations and their thought processes during deliberations is an improper analysis and an improper basis for the grant of relief. In addition to the Eleventh Circuit relying on improper juror impeachment evidence, the Eleventh Circuit's reasoning would require reversal in every case in which a juror asked a question about a fact or law not in record in the jury room or to the trial court, even if the juror was properly informed or instructed it could not consider that fact or law.

In light of the juror's testimony that the bailiff informed them that they had to base their decision on the charge as previously given by the trial court, Petitioner did not establish that but for this communication he would not have been sentenced to death.

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[5] Respondent also asserts that as there was no "extraneous information," Petitioner did not establish a colorable claim to shift the presumption of prejudice to Respondent.

This Court should grant certiorari review and reverse the Eleventh Circuit's grant of relief.

## IV. This Court Should Grant Certiorari Review To Correct The Eleventh Circuit's "Merits" Review Of Evidence That Was Not Admitted In The State Court Proceedings.

The Eleventh Circuit erroneously reviewed Petitioner's claim of improper jury/bailiff communication on "the merits" and found, based on testimony that was not admitted in the state court proceedings and the undeveloped evidence, that the trial bailiff had improperly informed the jury that parole was not an option in Petitioner's case although the state habeas court found the claim procedurally defaulted on adequate state law grounds.

The Eleventh Circuit also infers that Respondent did not attempt to rebut the presumption of prejudice in the state habeas proceeding, ironically, while noting that the state habeas court found the affidavit evidence and testimony inadmissible. *Ward v. Hall*, 592 F.3d 1179. There was no evidence before the state or federal habeas court for Respondent to rebut as the state habeas court made it clear that it was not considering juror testimony on the issue. (*See Id.* at 1174-1175, 1178).

This Court has recently remanded several cases in which it found the record was undeveloped. (*Wellons v. Hall*, 130 S. Ct. 727 (2010); *In re Davis*,

130 S. Ct. 1 (2009)). This case is likewise undeveloped. Should this Court find that the granting of certiorari review is premature, this Court should grant the petition for certiorari, vacate the Eleventh Circuit's grant of relief and remand for further development of the facts. "A full hearing is appropriate to 'determine the circumstances, the impact thereof upon the juror[s], and whether or not it was prejudicial. . . .'" *Remmer v. United States*, 347 U.S. 227, 230 (1954).

## CONCLUSION

WHEREFORE, for all of the above and foregoing reasons, Respondent prays that this Court grant certiorari and reverse the erroneous grant of sentencing relief.

Respectfully submitted,

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August 25, 2010

JAMES RAY WARD, Petitioner-Appellant,
versus WARDEN HILTON HALL, Georgia Diagnostic Prison, Respondent-Appellee.

No. 07-11360

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

592 F.3d 1144; 2010 U.S. App. LEXIS 80;
22 Fla. L. Weekly Fed. C 402

January 4, 2010, Decided
January 4, 2010, Filed

***JUDGES:*** Before EDMONDSON, BIRCH and BARKETT, Circuit Judges. EDMONDSON, Circuit Judge, concurs in the result

## OPINION

BIRCH, CIRCUIT JUDGE

Petitioner James Ray Ward, a Georgia death-row inmate, appeals the judgment of the United States District Court for the Northern District of Georgia denying his petition for the writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254. He raises issues challenging the validity of his convictions as well as his death sentence.[1] After careful consideration of

[1] Ward's claims, as formulated by the district court, include: (1) whether the district court erred in denying Ward's motion for an evidentiary hearing; (2) whether the district court erred in denying Ward's motion to expand the record; (3) whether the district court erred in denying Ward's claim in which he asserted that his counsel provided ineffective assistance by failing to

(Continued on following page)

the entire record, including oral argument, we AFFIRM Ward's convictions for murder, kidnaping [sic] with bodily injury, and feticide. As explained in Section IIE, however, we conclude that an improper bailiff-jury communication during the penalty phase violated Ward's constitutional right to a fair trial and a reliable sentence. We therefore REVERSE his death sentence and REMAND for a new sentencing phase hearing.

## I. BACKGROUND

In its order denying Ward's petition for a writ of habeas corpus, the district court reiterated the following findings of fact made by the Georgia Supreme Court in connection with Ward's direct appeal:

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investigate and present evidence of Ward's background and positive character traits in mitigation at sentencing; (4) whether the district court erred in denying Ward's claim in which he contended that his counsel provided ineffective assistance by failing to obtain competent, independent mental health expert assistance to prepare for trial and to present evidence; (5) whether the district court erred in determining that Ward's claim of juror/bailiff misconduct was procedurally defaulted and was not meritorious; (6) whether the district court erred in denying Ward's claim in which he asserted that his counsel provided ineffective assistance by failing to preserve the juror/bailiff misconduct claim by raising it on appeal; (7) whether the district court erred in denying Ward's claim that the state violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); and (8) whether the district court erred in denying Ward's claim that the unanimity instruction given by the trial court was unconstitutional.

The victim's husband left for work at 6:00 a.m. on August 17, 1989. When he returned from work that evening, the 23-year-old victim, who was five months pregnant, was missing, along with her car. Their 22-month-old daughter was at home by herself.

When the police arrived later that evening, many friends and relatives were present. At first, nothing appeared to be missing except for the victim and her car, but eventually it was learned that a telephone cord had been forcibly removed from the wall jack (leaving the plug), that most of the victim's underwear had been removed from her dresser drawer, and that a quilt and a baby blanket had been taken.

The victim's car was discovered the next day on an unpaved logging road. Her body was discovered the day after that in a trash dump several miles away. Ligature marks around her wrists and ankles indicated she had been bound. Three of her ribs were broken and there were various bruises about her body. Her fetus was in a partially delivered condition. The mother died of asphyxiation resulting from her pharynx being stuffed with wadded-up paper towels. The death of the mother resulted in the destruction of the fetus.

No clear suspects were developed for several months. Then, early in the morning of December 18, 1989, the defendant, wearing gloves and a stocking mask, broke into a

Gordon County home and kidnapped a woman [Donna Rich] from her bed as she lay sleeping with her nine-year-old daughter. He drove the woman to an abandoned farmhouse, forced her to model negligees he had brought with him, and raped her. Then he took her to another abandoned house and raped her again. He told her that he had killed two people and pointed out a "good place" to "dump bodies" if she ever wanted to. He also told her he had been watching her and told her some things about her personal situation that a stranger should not have known. He returned her to her home. Later, she discovered that some of her underwear was missing.

The Gordon County police arrested the defendant at his residence. The defendant's home was unfinished inside. Most of the walls were not sheetrocked and there was no running water and, except for the bedroom, no electricity. The unfinished rooms were full of boxes containing several thousands of dollars worth of lingerie and adult magazines. The defendant maintained notebooks carefully labelling (sic) and indexing magazines and lingerie catalogs (including descriptions and numerical ratings of women in the magazines). The officers found scraps of paper with physical descriptions of and tag numbers for women; dates, times and locations of observations; directions to their homes; newspaper clippings about rapes, murders and missing women; newspaper photographs

> of women; and driver's licenses and insurance cards belonging to various women.
>
> In addition, officers found handwritten directions to the home of the victim in this case, her swimming suit bottom, her quilt and baby blanket, and – hidden under a pile of wood – six newspaper articles about her disappearance.
>
> On January 18, 1990, the defendant admitted to police that he had visited the victim's home to check on a well he had helped drill earlier and had spoken to her. He said:
>
> I don't know if I done anything to the girl or not. I could have done it. . . .
>
> I been a liar all my life. I need some help. If I done it, I didn't mean for it to happen and I am sorry.

R4-77 at 48-52.

Ward was convicted by a jury in Walker County, Georgia, of feticide and the kidnaping and murder of Nikia Gilbreath and sentenced to death. Ward appealed his convictions and sentence to the Georgia Supreme Court. The Georgia Supreme Court affirmed Ward's convictions and sentence on 11 June 1992 and denied his motion for reconsideration on 2 July 1992. *See Ward v. State,* 262 Ga. 293, 417 S.E.2d 130 (Ga. 1992).

Ward then filed a petition for a writ of certiorari with the United States Supreme Court which was denied on 19 January 1993. *See Ward v. Georgia,* 506

U.S. 1085, 113 S. Ct. 1061, 122 L. Ed. 2d 366 (1993). Ward's petition for a re-hearing was likewise denied by the Supreme Court on 8 March 1993. *See Ward v. Georgia,* 507 U.S. 980, 113 S. Ct. 1438, 122 L. Ed. 2d 803 (1993).

On 19 April 1993, Ward filed a petition for a writ of habeas corpus ("state habeas petition") in the Superior Court of Butts County, Georgia.[2] The state habeas court conducted evidentiary hearings with respect to Ward's state habeas petition on 31 July 1997, 21 October 1997, 22 October 1997, and 22 December 1997. The court found that four of Ward's claims were procedurally defaulted because Ward failed to raise those claims on direct appeal and ultimately denied Ward's state habeas petition on 27 August 1998.

In response to Ward's application for a certificate of probable cause to appeal, the Georgia Supreme Court remanded Ward's state habeas petition to the Butts County Superior Court.[3] After complying with the instructions of the Georgia Supreme Court, the

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[2] Ward filed an amended petition in June 1995.

[3] The Georgia Supreme Court directed further review of the reasonableness of counsels' conduct regarding scientific testing of apparent blood stains found on Ms. Gilbreath's quilt, and permitted additional questioning of trial counsel, testing of blood, and further evidentiary development concerning the bloodstain issue. The state habeas court was also required to clarify the portion of its order that rejected Ward's claim that the bailiffs in his case had not been sworn.

state habeas court issued a second order making additional findings but again denying Ward's state habeas petition.

Ward filed a second application for a certificate of probable cause to appeal with the Georgia Supreme Court which was denied on 30 April 2003. Ward then filed another petition for a writ of certiorari with the United States Supreme Court, which was again denied, as was his petition for re-hearing.

On 29 April 2004, Ward filed his 28 U.S.C. § 2254 petition ("federal habeas petition") in the district court. He advanced thirty-six claims (as numbered in district court's order, *see* R4-77 at 23-39). The district court then directed both Ward and the state to file briefs addressing procedurally defaulted claims and unexhausted claims. After considering the briefs, the district court concluded that twenty-seven of Ward's claims were procedurally barred – four claims were procedurally defaulted because Ward failed to raise them on direct appeal and twenty-three were determined to be unexhausted and so procedurally barred. Ward filed a motion for reconsideration, which was denied on 6 October 2005.

On 14 October 2005, Ward filed a motion for leave to conduct discovery. The district court denied the motion on 19 December 2005. On 3 May 2006, Ward filed a motion for an evidentiary hearing. The district court denied that motion on 2 June 2006.

After considering Ward's memorandum in support of his petition for a writ of habeas corpus, the

state's brief in opposition, and Ward's reply brief, the district court denied Ward's petition on 6 February 2007. Ward filed a motion to alter or amend, which the district court also denied. The district court then granted Ward's motion for a certificate of appealability on eleven claims, eight of which are before us in this case.[4]

## II. DISCUSSION

"We review de novo a district court's grant or denial of a habeas corpus petition. The district court's factual findings are reviewed for clear error, while mixed questions of law and fact are reviewed de novo. An ineffective assistance of counsel claim is a mixed question of law and fact subject to de novo review." *McNair v. Campbell,* 416 F.3d 1291, 1297 (11th Cir. 2005) (citations omitted).

Because Ward filed his federal habeas petition after 24 April 1996, this case is governed by the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA precludes federal courts from granting habeas relief on claims that were previously adjudicated in state court unless the adjudication

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[4] The three issues included in the district court's certificate of appealability but not raised by Ward include: (1) Ward's claim that his counsel provided ineffective assistance by failing to challenge biased jurors; (2) his contention that the state made several improper and prejudicial arguments; and (3) the district court's denial of his motion for discovery.

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

As explained by the Supreme Court, the phrase "'clearly established Federal law' . . . refers to the holdings . . . of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams v. Taylor,* 529 U.S. 362, 412, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389 (2000). We have held that to be "contrary to" clearly established federal law, the state court must either (1) apply a rule "that contradicts the governing law set forth by Supreme Court case law," or (2) reach a different result from the Supreme Court "when faced with materially indistinguishable facts." *Putman v. Head,* 268 F.3d 1223, 1241 (11th Cir. 2003).

As regards the "unreasonable application" prong of § 2254(d)(1), we have held as follows:

> A state court decision is an unreasonable application of clearly established law if the state court unreasonably extends or fails to extend a clearly established legal principle to a new context. An application of federal law cannot be considered unreasonable merely

> because it is, in our judgment, incorrect or erroneous; a state court decision must also be unreasonable. Questions of law and mixed questions of law and fact are reviewed de novo, as is the district court's conclusion regarding the reasonableness of the state court's application of federal law.

*Jennings v. McDonough,* 490 F.3d 1230, 1236 (11th Cir. 2007) (quotation marks and citations omitted). In sum, "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams,* 529 U.S. at 409, 120 S. Ct. at 1521. Finally, 28 U.S.C. § 2254(e)(1) commands that for a writ to issue because the state court made an "unreasonable determination of the facts," the petitioner must rebut "the presumption of correctness [of a state court's factual findings] by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

A critical prerequisite for any state petitioner seeking federal habeas relief is the requirement that he first properly raise the federal constitutional claim in the state courts. *See id.* § 2254(b). The exhaustion requirement springs from principles of comity, which protect the state court's role in the enforcement of federal law and prevent disruption of state court proceedings. *See Rose v. Lundy,* 455 U.S. 509, 518, 102 S. Ct. 1198, 1203, 71 L. Ed. 2d 379 (1982). The statute provides that:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody

> pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

28 U.S.C. § 2254(b). Thus, in order to exhaust state remedies, a petitioner must fairly present every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review. *See Castille v. Peoples,* 489 U.S. 346, 351, 109 S. Ct. 1056, 1060, 103 L. Ed. 2d 380 (1989) (quotation marks and citation omitted). In addition, the state court petition must make the state courts aware that the claims asserted do, in fact, raise federal constitutional issues. *See Snowden v. Singletary,* 135 F.3d 732, 735 (11th Cir. 1998). If a petitioner fails to exhaust state remedies, the district court should

dismiss the petition without prejudice to allow exhaustion. *See Rose,* 455 U.S. at 519-20, 102 S. Ct. at 1203-04.

"The teeth of the exhaustion requirement comes from its handmaiden, the procedural default doctrine." *Smith v. Jones,* 256 F.3d 1135, 1138 (11th Cir. 2001). The doctrine of procedural default dictates that "[a] state court's rejection of a petitioner's constitutional claim on state procedural grounds will generally preclude any subsequent federal habeas review of that claim." *Judd v. Haley,* 250 F.3d 1308, 1313 (11th Cir. 2001). However, a state court's rejection of a federal constitutional claim on procedural grounds may only preclude federal review if the state procedural ruling rests upon "adequate and independent" state grounds. *Marek v. Singletary,* 62 F.3d 1295, 1301 (11th Cir. 1995) (citation omitted).

We have "established a three-part test to enable us to determine when a state court's procedural ruling constitutes an independent and adequate state rule of decision." *Judd,* 250 F.3d at 1313. "First, the last state court rendering a judgment in the case must clearly and expressly state that it is relying on state procedural rules to resolve the federal claim without reaching the merits of that claim."[5] *Id.*

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[5] We qualify *Judd*'s first prong with the following observation from the Supreme Court:

> The problem we face arises, of course, because many formulary orders are not meant to convey anything as to the reason for the decision. Attributing a reason is

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Second, the state court's decision must rest entirely on state law grounds and not be intertwined with an interpretation of federal law. *See id.* Third, the state procedural rule must be adequate, i.e., firmly established and regularly followed and not applied "in an arbitrary or unprecedented fashion." *Id.*

A federal court may still address the merits of a procedurally defaulted claim if the petitioner can show cause for the default and actual prejudice resulting from the alleged constitutional violation. *See Wainwright v. Sykes,* 433 U.S. 72, 84-85, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977). To show cause, the petitioner must demonstrate "some objective factor external to the defense" that impeded his effort

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> therefore both difficult and artificial. We think that the attribution necessary for federal habeas purposes can be facilitated, and sound results more often assured, by applying the following presumption: Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion "fairly appears to rest primarily upon federal law, we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place." Similarly where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.

*Ylst v. Nunnemaker,* 501 U.S. 797, 803, 111 S. Ct. 2590, 2594, 115 L. Ed. 2d 706 (1991) (quotation marks, citations and alterations omitted).

to raise the claim properly in state court. *Murray v. Carrier,* 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986). A showing that the legal basis for a claim was not "reasonably available to counsel" could constitute cause. *Reed v. Ross,* 468 U.S. 1, 16, 104 S. Ct. 2901, 2910, 82 L. Ed. 2d 1 (1984). We have also determined that an ineffective-assistance-of-counsel claim, if both exhausted and not procedurally defaulted, may constitute cause. *See Hill v. Jones,* 81 F.3d 1015, 1031 (11th Cir. 1996). As stated by the Supreme Court, "ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim." *Edwards v. Carpenter,* 529 U.S. 446, 451, 120 S. Ct. 1587, 1591, 146 L. Ed. 2d 518 (2000).

It is well established that if the petitioner fails to show cause, we need not proceed to the issue of prejudice. *See McCleskey v. Zant,* 499 U.S. 467, 502, 111 S. Ct. 1454, 1474, 113 L. Ed. 2d 517 (1991). Once cause is established, however, the petitioner also must show actual prejudice from the alleged constitutional violation. *See Sykes,* 433 U.S. at 84, 97 S. Ct. at 2505. We have held that in order to show prejudice, a petitioner must demonstrate that "the errors at trial actually and substantially disadvantaged his defense so that he was denied fundamental fairness." *McCoy v. Newsome,* 953 F.2d 1252, 1261 (11th Cir. 1992) (per curiam).

Finally, if a petitioner cannot show cause and prejudice, there remains yet another avenue for him

to receive consideration on the merits of his procedurally defaulted claim. "[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Carrier,* 477 U.S. at 496, 106 S. Ct. at 2649. "This exception is exceedingly narrow in scope," however, and requires proof of actual innocence, not just legal innocence. *Johnson v. Alabama,* 256 F.3d 1156, 1171 (11th Cir. 2001).

Having established the legal framework governing Ward's habeas petition, we address each of his arguments in turn.

A. Ward's Motion for an Evidentiary Hearing

Ward contends that the district court erred in denying his motion for an evidentiary hearing.[6] Ward argues that an evidentiary hearing was necessary for him to present evidence in support of his claim of ineffective assistance of counsel during the sentencing phase of his trial. He asserts that he was unable to develop those claims fully in the state habeas court proceedings through no fault of his own but rather due to the budget and staffing problems of the Georgia Appellate Practice and Educational

[6] We note that Ward's argument on appeal mirrors his argument before the district court on this issue.

Resource Center ("Georgia Resource Center").[7] Ward maintains that 28 U.S.C. § 2254(e)(2) does not apply to him because he was reasonably diligent in his attempt to develop the record in state court. He submits that the Georgia courts' refusal to fund investigative efforts "cannot translate into a failure to develop" on his part. R2-48 at 12.

Specifically, Ward seeks an evidentiary hearing in order to present evidence that his trial counsel provided ineffective assistance by failing to present sufficient mitigating evidence during the sentencing phase of his trial, and by failing to obtain competent, independent mental health expert assistance to prepare for trial and to present evidence. Ward contends that numerous witnesses were available to testify about his troubled childhood, the allegedly harsh conditions imposed by his adoptive parents, his poor school performance, and his good character as an adult. In addition, Ward argues that his trial counsel failed to secure and submit affidavits from members of the community who would have asked the jury to spare his life.

Under 28 U.S.C. § 2254(e)(2), as amended by the AEDPA, a federal court shall not hold an evidentiary hearing on a claim if the petitioner has failed to

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[7] The Georgia Resource Center was established by the Georgia Supreme Court in 1988 in order to recruit volunteer counsel for Georgia capital post-conviction cases.

develop the factual basis for the claim in state court unless the petitioner shows that

> (A) the claim relies on –
>
> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). If the petitioner was not diligent in his efforts to develop his claim in state court, he may not receive an evidentiary hearing unless he can satisfy the provisions of § 2254(e)(2)(A) and (B). *See Williams v. Taylor,* 529 U.S. 420, 437, 120 S. Ct. 1479, 1491, 146 L. Ed. 2d 435 (2000).

As regards the diligence requirement, the Supreme Court instructs us that

> [f]or state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the

> absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings. Yet comity is not served by saying a prisoner has failed to develop the factual basis of a claim where he was unable to develop his claim in state court despite diligent effort. In that circumstance, an evidentiary hearing is not barred by § 2254(e)(2).

*Id.* (quotation marks omitted). In light of this guidance, the question of whether a petitioner must satisfy § 2254(e)(2)'s requirements turns on whether the petitioner or his counsel were diligent in developing the record in the state habeas proceedings. If so, a federal court may grant an evidentiary hearing without further regard for the provisions of § 2254(e)(2). If not, § 2254(e)(2)'s requirements must be met. We review a district court's decision to grant or deny an evidentiary hearing for abuse of discretion, *see McNair,* 416 F.3d at 1297, and note that a determination of diligence is a finding of fact which we will not disturb unless it is clearly erroneous. *See Hall v. Head,* 310 F.3d 683, 697 (11th Cir. 2002).

On 2 June 2006, the district court denied Ward's motion for an evidentiary hearing. The district court concluded that Ward was not diligent in developing the facts underlying his claims of ineffective

assistance of counsel (for failure to investigate adequately and present mitigating evidence during sentencing and for failure to obtain competent, independent mental health expert assistance to prepare for trial and to present evidence) in the state habeas proceedings. The district court presented four reasons for its decision.

First, the district court looked to our decisions in *McNair* and *Isaacs v. Head,* 300 F.3d 1232 (11th Cir. 2002). The district court relied upon our finding in *McNair* that the district court in that case abused its discretion in granting an evidentiary hearing because, inter alia, the petitioner had failed to present any evidence before the state habeas court in support of his ineffective assistance of counsel claim, even though he had ample opportunity to do so. *See McNair,* 416 F.3d at 1299. The district court also cited our determination in *Isaacs* that the petitioner was not entitled to an evidentiary hearing before the federal habeas court because he failed to develop the factual predicate underlying his claim when presented with an opportunity to do so before the state habeas court. *See Isaacs,* 300 F.3d at 1249-50.

Second, the district court reiterated the rule that a petitioner must raise claims of which he or his counsel are aware in the state habeas proceedings. Third, the district court cited two Fifth Circuit opinions in support of its determination that Ward should have obtained and presented the affidavits and testimony at issue in the state habeas proceedings and that any argument about lack of funding is

without merit because "'[o]btaining affidavits from family members is not cost prohibitive.'" R2-53 at 22 (quoting *Dowthitt v. Johnson,* 230 F.3d 733, 758 (5th Cir. 2000)); *see also Roberts v. Dretke,* 356 F.3d 632, 641 (5th Cir. 2004) ("Seeking and presenting medical records and affidavits from family members available at the time of the state habeas hearing is within the exercise of due diligence."). Finally, the district court referenced another district court case for the proposition that a

> [p]etitioner's complaint about limited funding for investigative expenses incurred during his state habeas corpus proceeding does not excuse the failure of petitioner's state habeas counsel to contact petitioner's family members and others possessing personal knowledge of the matters central to petitioner's unexhausted claims herein. The failure to present the state habeas court with either specific factual allegations or affidavits from petitioner and petitioner's family supporting petitioner's unexhausted claims herein was not of due diligence.

*Gutierrez v. Dretke,* 392 F. Supp. 2d 802, 891 (W.D. Tex. 2005).

In short, the district court concluded that because Ward failed to present the evidence (testimony and affidavits from family and friends) at his state habeas proceeding that he now seeks to introduce via an evidentiary hearing at his federal habeas proceeding, his protestation of diligence fell short of the

mark. The district court noted that Ward did manage to present some evidence underlying his claims to the state habeas court – a fact that signaled to the district court that Ward's state habeas counsel "indeed had sufficient funding and time to do at least some investigation and evidence gathering, but that counsel simply chose not to pursue the affidavits that [Ward] now seeks to present." R2-53 at 24. After finding that Ward was not sufficiently diligent at the state habeas proceedings, the district court also determined that he did not meet the more stringent requirements of § 2254(e)(2)(A) and (B).

Based on our review of the record, we conclude that the district court's finding that Ward was not diligent was not clearly erroneous and its denial of Ward's motion for an evidentiary hearing was not an abuse of discretion. First, we consider the time line involved. Ward filed his state habeas petition on 19 April 1993. On 21 November 1994, the Georgia Resource Center assumed responsibility for Ward's case. The superior court set a tentative date for an evidentiary hearing for June or July 1995, providing Ward with at least seven months to secure affidavits and other witness testimony. The evidentiary hearing was then rescheduled for 21-22 November 1995.[8] It was then delayed again until 29-30 May 1997, and then again until 31 July 1997. At that point, Ward had had

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[8] During this time period (November-December 1995), Mr. Stephen Bayliss ("Bayliss") became counsel of record for Ward.

over two years to prepare for the evidentiary hearing before the state habeas court. In addition, two more evidentiary hearings were held, one from 21-22 October 1997 and another on 22 December 1997. Over the course of the four days of evidentiary hearings, Ward ultimately tendered thirty-seven exhibits, including twelve affidavits and one deposition.

Given the fact that Ward was afforded approximately three years to secure affidavits and witness testimony prior to his state habeas evidentiary hearings and managed to submit numerous exhibits and affidavits during the course of his hearings, including affidavit testimony from family members, friends, acquaintances, and former jurors, we cannot credit his claim that he exercised due diligence. Indeed, the record compels the contrary conclusion that Ward, as the district court correctly found, "simply chose not to pursue the affidavits [then] that [he] now seeks to present." R2-53 at 24. Moreover, Ward presents no evidence suggesting that the material that he now seeks to present was not available during the period between the submission of his state habeas petition and his state habeas evidentiary hearings, nor has he offered any legal authority in support of his claim that limited funding somehow excuses his or his state habeas counsel's failure to contact additional potential witnesses or to gather additional evidence. Accordingly, we conclude that Ward was not diligent. As such, he is subject to § 2254(e)(2)(A) and (B)'s more exacting standard. *See Waters v. Thomas,* 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc) ("That other

witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel.").

As we already have indicated, we also agree with the district court's findings regarding Ward's failure to satisfy the requirements of § 2254(e)(2)(A) and (B). Ward's argument hinges on the threshold question of his diligence in developing the record underlying his claims in the state habeas proceedings. He presents no alternative argument should we find, as we have, that he is subject to § 2254(e)(2)(A) and (B). We note that Ward seeks to submit material via a federal habeas evidentiary hearing in support of both a claim relating to his sentence (i.e., Ward's contention that his trial counsel provided ineffective assistance in failing to investigate adequately and present mitigating evidence at the sentencing phase of his trial) and a claim arguably relating to both the guilt and innocence phase and the sentencing phase of his trial (i.e., Ward's claim that his trial counsel provided ineffective assistance by failing to obtain competent, independent mental health expert assistance to prepare for trial). First, we previously have determined that the § 2254(e)(2)(A) and (B) exceptions do not apply to issues relating to the sentencing phase of a trial. *See In re Jones,* 137 F.3d 1271, 1274 (11th Cir. 1998) (per curiam) ("As [we have] noted, and the statute itself specifies, this exception applies only to claims going to the question of whether or not the applicant is

'guilty of the underlying offense' – not to claims related to sentence."). Second, Ward has not established that his ineffective-assistance-of-counsel claim regarding the failure to obtain independent mental health expert assistance meets any of the exceptions enumerated in § 2254(e)(2)(A) and (B). Accordingly, we conclude that the district court did not abuse its discretion in denying Ward an evidentiary hearing.

B. Ward's Motion to Expand the Record

Ward argues that the district court erred in denying his 23 October 2006 motion to expand the record pursuant to Rule 7(a) of the Rules Governing Section 2254 Cases ("Rule 7").[9] In his motion to the

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[9] Rule 7 of the Rules Governing Section 2254 Cases ("Rule 7") provides:

> (a) In general. If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.
>
> (b) Types of materials. The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.
>
> (c) Review by the opposing party. The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

28 U.S.C. § 2254 Rule 7.

district court, Ward sought the introduction of the same affidavits that he submitted with his previous motion for an evidentiary hearing. The district court denied the motion, stating that its "[c]onsider[ation] [of] the affidavits in connection with the merits of [Ward's] § 2254 Petition would, in effect, allow [Ward] to do an end-run around the Court's decision denying [Ward] an evidentiary hearing." R3-68 at 4-5. On appeal, Ward challenges the district court's reference to § 2254(e)(2), arguing that because § 2254(e)(2) concerns requests for evidentiary hearings, it was error for the district court to look to that provision in ruling on Ward's motion to expand the record.

We review a district court's denial of a Rule 7 motion to expand the record for abuse of discretion. *See Haliburton v. Sec'y for the Dep't of Corr.*, 342 F.3d 1233, 1242 (11th Cir. 2003); *see also Ford v. Seabold*, 841 F.2d 677, 691 (6th Cir. 1988). Although we have not yet addressed the interplay between § 2254(e)(2) and Rule 7, the Supreme Court and two of our sister circuits have. In *Holland v. Jackson*, 542 U.S. 649, 652-53, 124 S. Ct. 2736, 2738, 159 L. Ed. 2d 683 (2004), the Court determined that

> [u]nder the habeas statute, [the witness's] statement could have been the subject of an evidentiary hearing by the District Court, but only if respondent was not at fault in failing to develop that evidence in state court, or (if he was at fault) if the conditions prescribed by § 2254(e)(2) were met. Those same restrictions apply a fortiori when a

> prisoner seeks relief based on new evidence without an evidentiary hearing.

*Id.* (citations omitted). The Seventh Circuit formulated its rationale as follows:

> The ability of a habeas petitioner to introduce new evidence into the record depends on the interplay between two provisions: 28 U.S.C. § 2254(e)(2) and Habeas Corpus Rule 7. Section 2254(e)(2) addresses the requirements to obtain an evidentiary hearing. It provides: "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows . . . a factual predicate that could not have been previously discovered through the exercise of due diligence." Habeas Rule 7 preceded the enactment of this provision and speaks to when a district court may expand the record. It provides that the district 'judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.'
>
> . . . .
>
> . . . When expansion of the record is used to achieve the same end as an evidentiary hearing, the petitioner ought to be subject to the same constraints that would be imposed if he had sought an evidentiary hearing. . . . Thus, to introduce . . . new affidavits, [the petitioner] must satisfy the standards of § 2254(e)(2).

*Owens v. Frank*, 394 F.3d 490, 498-99 (7th Cir. 2005) (quotation marks and citations omitted). Likewise, the Ninth Circuit concisely summed up its holding on this matter by stating that

> [t]he Supreme Court recently made clear in *Holland v. Jackson*, that the conditions of § 2254(e)(2) generally apply to Petitioners seeking relief based on new evidence, even when they do not seek an evidentiary hearing. An exception to this general rule exists if a Petitioner exercised diligence in his efforts to develop the factual basis of his claims in state court proceedings. We hold that this exception does not apply because . . . Petitioner did not exercise the required diligence. Thus, under *Holland*, he must comply with § 2254(e)(2) in order to expand the record under Rule 7.

*Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241 (9th Cir. 2005) (citations omitted).

In light of the Supreme Court's guidance in *Holland* and our sister circuits' considered positions on the issue, and given our previous conclusion concerning Ward's lack of diligence, we conclude that Ward must comply with § 2254(e)(2) in order to expand the record under Rule 7. Because we find that he cannot meet that burden, we conclude that the district court did not err in denying Ward's motion to expand the record.

C. Ineffective Assistance of Counsel for Failure to Investigate Mitigating Factors for the Sentencing Phase

Ward argues that his trial counsel, Christopher Townley ("Townley")[10], failed to conduct an adequate background investigation before deciding on a strategy for the sentencing phase of his trial. He claims that although a private investigator was hired for the case, his duties extended solely to the merits phase of the trial and that the task of developing background information for sentencing was delegated to Townley's legal assistant, Deana Jones ("Jones"). Ward challenges Townley's testimony at the state habeas proceeding that he gained sufficient information about Ward's background by speaking with some of Ward's family members and by having others interviewed by staff members. Ward contends that Townley's efforts to interview Ward's family, friends, former teachers, and employers were not sufficient to enable him to make a reasoned tactical decision about the sentencing phase defense. Moreover, Ward argues that because Townley knew that Ward's childhood was particularly traumatic, he should have sought out additional information about Ward's early life.

We have held that the petitioner bears the heavy burden of proving his ineffective-assistance-of-counsel

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[10] Although David Dunn also represented Ward at his trial, Ward contends that Townley "alone called the shots regarding the penalty phase" of the trial. Appellant's Initial Brief at 21 n.10.

claim by a preponderance of the evidence. *Putman*, 268 F.3d at 1243. That said, we also note that a petitioner need not present testimonial evidence but a federal court may make a fair determination of the claim simply by reviewing the trial transcripts. *See Eagle v. Linahan*, 279 F.3d 926, 938 (11th Cir. 2001).

*Strickland v. Washington* instructs us that the benchmark for judging a claim of ineffective assistance of counsel is whether counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). In order to prevail on an ineffective-assistance-of-counsel claim, a petitioner must establish two things. First, he must prove that counsel's performance was deficient. "Second, the [petitioner] must show that the deficient performance prejudiced the defense." *Id.* at 687, 104 S. Ct. at 2064. We echo the caution sounded by the Court in *Strickland:* "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693, 104 S. Ct. at 2067. We also note the absence of any iron-clad rule requiring a court to tackle one prong of the *Strickland* test before the other. Indeed, we previously have concluded that because both parts of the test must be satisfied to show a Sixth Amendment violation, a court need not address the performance prong if the petitioner cannot meet the prejudice prong, and vice-versa. *See Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000).

In order to prove the deficient performance prong of the *Strickland* test, the petitioner must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland,* 466 U.S. at 688, 104 S. Ct. at 2065. "Judicial scrutiny of counsel's performance must be highly deferential" and there is a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* at 689, 104 S. Ct. at 2065. Indeed, as we have said, "[t]he test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead, the test is . . . whether what [counsel] did was within the wide range of reasonable professional assistance." *Waters,* 46 F.3d at 1518 (quotation marks and citation omitted). In order to establish that counsel's conduct was unreasonable, therefore, the petitioner must prove "that no competent counsel would have taken the action that his counsel did take." *Chandler v. United States,* 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc). Restated, "[t]he test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *Waters,* 46 F.3d at 1512 (quotation marks and citation omitted).

Another important facet of most ineffective-assistance-of-counsel claims is trial strategy. We have

long held that the fact that a particular defense was unsuccessful does not prove ineffective assistance of counsel. *See Chandler,* 218 F.3d at 1314. Moreover, "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken might be considered sound trial strategy." *Id.* (quotation marks and citation omitted). We stated the following regarding trial strategy and its relationship to ineffective-assistance-of-counsel claims:

> By "strategy," we mean no more than this concept: trial counsel's course of conduct, that was neither directly prohibited by law nor directly required by law, for obtaining a favorable result for his client. For example, calling some witnesses and not others is "the epitome of a strategic decision." [*Waters,* 46 F.3d] at 1512 (en banc); *see also id.* at 1518-19 (en banc); *Felker v. Thomas,* 52 F.3d 907, 912 (11th Cir. 1995) (whether to pursue residual doubt or another defense is strategy left to counsel, which court must not second-guess); *Stanley v. Zant,* 697 F.2d 955, 964 (11th Cir. 1983) (stating that reliance on line of defense to exclusion of others is matter of strategy).

*Chandler,* 218 F.3d at 1314 n.14. The *Strickland* Court also has discussed trial strategy in the context of ineffective-assistance-of-counsel claims and underscores the importance of counsel's decision whether to conduct investigations as part of that strategy. As stated by the Court:

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

*Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2066. The Court also addressed the duty to adequately investigate mitigating evidence in *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

> *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. . . . [S]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation.

*Id.* at 533, 123 S. Ct. at 2541 (quotation marks and citation omitted).

If the petitioner is successful in proving deficient performance by counsel, he must then establish prejudice before he is entitled to relief. To prove prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id.*, 104 S. Ct. at 2068. Moreover,

> [t]he governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

*Id.* at 695, 104 S. Ct. at 2068-69. Finally, in making the prejudice determination, the court must consider the totality of the evidence before the judge or jury in question. *See id.* at 695, 104 S. Ct. at 2069. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors

than one with overwhelming record support." *Id.* at 696, 104 S. Ct. at 2069.

Ward first raised the ineffective-assistance-of-counsel claim at issue in his state habeas petition. In his first state habeas petition, Ward claimed that "[c]ounsel failed to conduct an adequate pretrial investigation into Petitioner's life and background to uncover and present to the jury evidence in mitigation . . . [and] [a]s a result, the jury failed to hear compelling evidence in mitigation of sentence." R1-6, Exh. 51 at 5. Ward reiterated his claim in his first amended state habeas petition. After evidentiary hearings held by the state habeas court, Ward filed a post-hearing brief in support of his state habeas petition.

In his post-hearing brief, Ward contended that Townley's initial strategy for the sentencing phase of the trial was to present evidence of Ward's deprived childhood through the testimony of his biological mother, Cora Jones. Ward claimed that during his sentencing phase opening argument, Townley primed the jury to expect to be presented with evidence of Ward's childhood but then failed to present any such evidence, even though it was readily available. Ward further claimed that Townley made only minimal efforts to contact Cora Jones and secure her presence at trial and that even those minimal efforts were

subcontracted to his legal assistant.[11] In addition, Ward noted that Townley failed to produce several other family members and acquaintances, all of whom would have had positive things to say about Ward during the sentencing phase of his trial. These individuals included Elyse Stockton (Ward's adoptive niece), Sammy Wyatt (Ward's co-worker), and Fred Dukes (Ward's supervisor).

The state habeas court denied Ward's state habeas petition on 27 August 1998. Before discussing the merits of Ward's various ineffective-assistance-of-counsel claims, the state habeas court commented on the relative experience and depth of knowledge in death penalty litigation possessed by each of Ward's trial attorneys (Townley and Dunn). "At the time of [Ward's] trial, attorney Townley had previously been involved in the prosecution of at least three death penalty cases, and had conducted the defense in a death penalty case that ultimately resulted in a guilty plea. Attorney Dunn had been the lead prosecutor on two death penalty cases and assisted on two others." R1-6, Exh. 70 at 7 (citation omitted).

The state habeas court then addressed Ward's claim that his trial counsel "failed to effectively investigate and present evidence regarding his childhood

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[11] Although Cora Jones had been subpoenaed, Ward also cites Townley's failure to request a continuance in order to search for Jones and his failure to utilize the Walker County Sheriff's Department to bring Jones to trial.

and his positive character traits." *Id.* at 9. The court made the following findings:

> Although defense counsel decided not to present evidence regarding [Ward's] childhood, their investigation into the issue was certainly reasonable. Information was obtained from [Ward's] biological mother, but she ultimately refused to testify on her son's behalf. Defense counsel talked to [Ward's] siblings, but decided not to use their testimony because they had come from the same environment and, unlike [Ward], had 'apparently done pretty well for themselves.' In addition to talking to family members, defense counsel obtained [Ward's] school, medical, and psychological records. [Ward] has failed to show that defense counsels' investigation or strategic decision not to present evidence on this issue was deficient.

*Id.* at 9-10 (citations omitted). The next court to address the issue was the district court in its denial of Ward's federal habeas petition.

The district court ultimately concluded that the state habeas court's decision with respect to the ineffective-assistance-of-counsel claim at issue was not contrary to, or an unreasonable application of, clearly established federal law, and that this determination was not based on an unreasonable application of the facts. The district court noted that Ward's trial attorneys obtained information about Ward's background from Ward himself (via Ward's autobiography), from conversations with Ward's

family members, his elementary school teacher and with a minister familiar with Ward. In addition, Ward's attorneys investigated Ward's past psychological history, prison history, and school background, successfully obtained Ward's school and chiropractic records, and attempted to obtain Ward's birth certificate and psychological records.

The district court found that Ward's trial counsel made a reasonable, strategic decision not to introduce mitigating evidence concerning Ward's background and early years. The court pointed to Townley's testimony regarding the penalty phase of Ward's trial in support of its finding:

> A [Townley]: We wanted to try to put together the best presentation that we could to try to convince a very conservative jury not to give him the chair. The Walker County juries historically are sort of notorious about not wanting to hear, Gee, poor me, unless you couple it with remorse. We didn't have remorse. And as a result, we felt like it was stronger to go in other directions for the death penalty, to try to prevent it.
>
> Q: Can you elaborate what you mean by the, Gee, poor me, what all that type of defense entails?
>
> A: When I use that term what I'm referring to is you put in a lot of evidence concerning the defendant's background showing what got him to that point, that there were things beyond his control and his early

> years, usually, that put him in the position to be doing the events that he is convicted of. And I think sometimes that can be a very effective, very effective argument because there is a lot of truth in it.

R4-77 at 79-80. The district court also highlighted the fact that Ward's trial counsel took into account the individual jurors selected when devising a trial strategy and further noted that Townley's decision to not present evidence concerning Ward's troubled childhood was reasonable in light of Ward's age (thirty-three) at the time that the crime was committed.

The district court then entertained Ward's specific complaints regarding Townley's failure to present the testimony of Ward's biological mother, his failure to investigate adequately Ward's adoptive parents and the manner in which they raised Ward, and his failure to investigate and pursue evidence concerning Ward's positive character traits. With regard to Townley's alleged failure to present any testimony from Ward's biological mother, Cora Jones, the district court noted Ms. Jones indicated that she did not wish to testify at Ward's trial, refused to answer telephone calls to her residence by members of the defense team, and otherwise actively evaded efforts by the defense team to contact her during the sentencing phase of Ward's trial. In light of this recalcitrant behavior, Townley made a reasoned decision to forego Ms. Jones's testimony for fear that she might

prove hostile on the stand and do more harm than good for the case.

With regard to Ward's contention that Townley failed to conduct a reasonable investigation concerning his adoptive parents and the environment in which he was raised, the district court noted that Townley did query Ward about his adoptive parents and also learned much about Ward's upbringing through Ward's autobiography. After considering the information available, Townley concluded that although Ward's adoptive parents were perhaps too strict, Ward "basically had good feelings" towards them. *Id.* at 85. Consequently, Townley decided against introducing evidence concerning Ward's strict upbringing. The district court recited Townley's rationale as follows:

> One of the things that I was concerned about if I went too far down that road was that [Ward] had had a bad environment, but he had a brother who had had a bad environment, he had a sister who had had a bad environment. They had apparently done pretty well for themselves. The brother's feelings were that he didn't believe [Ward] did it, but if [Ward] did it, that he came from the same background, and somebody who would do that should get the chair. The State was aware of that. He had apparently spent a long time talking with Johnny Bass, who was the State's investigator, and I was concerned about some of how that evidence would come across.

*Id.*

Finally, the district court addressed Ward's claim that Townley should have pursued other evidence in mitigation, including evidence concerning his positive character traits or his childhood surgeries and illnesses. First, the district court noted that Townley actually did secure and review Ward's school records, but ultimately decided not to use them in the sentencing phase of the trial. Then the court emphasized the fact that Townley's professed strategy during the penalty phase of the trial was to focus on the non-intentional nature of Ms. Gilbreath's death and residual doubt. Given that decision, the district court found that Townley's alleged failure to pursue additional mitigation evidence was not objectively unreasonable.

The district court also concluded that Ward could not satisfy the prejudice prong of the *Strickland* test. First, the evidence incriminating Ward, although circumstantial, was strong. Second, the court reflected on the additional damning evidence presented to the jury: the fact that the victim was four months pregnant at the time of her murder; the fact that Ward had been convicted of abducting and raping another woman; the fact that Ward had allegedly stalked or attempted to accost other women; and the fact Ward maintained a considerable stockpile of pornographic material and women's lingerie in his home. Given the wealth of evidence against Ward, the district court concluded that there existed no reasonable probability that the results of the sentencing phase of Ward's trial would have been different had

his trial counsel pursued and presented additional mitigation evidence.

After careful review of the record, we are of the same mind as the district court and conclude that Townley's investigation and presentation of mitigation evidence during the sentencing phase of Ward's trial were well "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. While mindful of the Supreme Court's guidance in *Wiggins* regarding the assessment of strategic choices and the reasonableness of investigations into mitigating evidence, we also recognize that "[i]t is reasonable – and not ineffective – for trial counsel to eliminate certain lines of presentation if he has misgivings about hurtful cross-examination and rebuttal witnesses." *Hallford v. Culliver*, 459 F.3d 1193, 1205 (11th Cir. 2006) (per curiam) (quotation marks and citation omitted). We have also observed that "[e]ven when trial counsel's investigation is less complete than collateral counsel's, trial counsel has not performed deficiently when a reasonable lawyer could have decided, in the circumstances, not to investigate." *Id.* (quotation marks and citation omitted).

Here, the record indicates that Townley was aware of the bulk of the mitigating evidence alluded to by appellate counsel during the state and federal habeas proceedings. This signals that he did conduct a reasonable investigation but chose not to present much of the evidence during the sentencing phase of Ward's trial. First, Ward's biological mother, Cora

Jones, essentially refused to testify on her son's behalf.[12] This reluctance informed Townley's decision not to attempt to present her testimony to the jury during the sentencing phase of the trial. As stated by Townley:

> If I have a witness in sentencing phase who does not want to be there and doesn't want to participate and is going to have to have [sic] an attachment and have a Sheriff's deputy bring them to court, that is usually not a

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[12] At the state habeas proceedings, Townley's legal assistant, Deana Jones, provided the following testimony regarding her efforts to contact Cora Jones:

> A [Deana Jones]: While we were in court even, I called her [Jones] because I had asked her, "If you won't come to court, if you will not let me come and get you, then will you please stay by the phone in case we need anything, I can give you a call?" She said "Okay, I can do that." And then I called her several times, three or four times during court, and there was no answer. So that night I called, and I left a message, and I said something to the effect of, "We don't need you. I just want to talk to you. Could you call me?" And she did call then. But that was it, she didn't answer. So I asked her why she wasn't by the phone and she said she would be, and she said, that is the time that she said something about her laundry.
>
> . . . .
>
> Q: Let me ask you. So was it apparent to you that she was trying to do everything she good [sic] to avoid coming to court for Mr. Ward?
>
> A: Yes.

R1-6, Exh. 61 at 160-61.

witness that I want to introduce to bring sympathy in a sentencing phase, no.

R1-6, Exh. 62 at 399-400.

Turning to Townley's decision to forgo presentation of evidence relating to Ward's adoptive parents and the environment in which they raised him, we find Townley's rationale, as cited by the district court, quite persuasive. After discussing Ward's upbringing at length with Ward himself, Townley concluded that the introduction of evidence concerning his life with his adoptive parents likely would have little effect on the jury. According to Townley, Ward maintained good feelings towards his adoptive parents and was reluctant to characterize their treatment of him as abusive.

Q: And what did [Ward] tell you, and what was your, I guess, feeling about the environment that he was raised in by the Wards?

A [Townley]: Poor; country; good people; strict; an adoptive father who was, in my feeling, too strict. But he basically had good feelings towards them.

. . . .

Q: Did [Ward] feel like he had been abused by them?

A: I think he would agree with me that his father was too strict. But [Ward], in some ways, felt like that he deserved it, and his father was doing it as a father as opposed to

> just some drunken fellow lashing out at his child at night.

*Id.* at 338. Moreover, Townley's concern that the jury might compare and contrast Ward's behavior with that of his adoptive nephew (John Pettit, Jr.) appears justified in light of Mr. Pettit's testimony at the state habeas proceeding.

> Q: Let me ask you this, Mr. Pettit, did you notice any type of different treatment that your grandparents gave you and your sister as opposed to the treatment that they gave Mr. Ward?
>
> A [Pettit]: I think that they treated [Ward] as a child, and they treated us as grandchildren, and there is a difference in that relationship. I would not say that we were treated any worse or any better, but we were grandchildren, and he was their child.
>
> Q: Let me ask you this. Did they look after you and provide a safe environment for you and your sister?
>
> A: Yes.
>
> Q: Did they also do that for [Ward]?
>
> A: Yes.

R1-6, Exh. 61 at 136.

Finally, considering the circumstances presented to Townley at the sentencing phase of the trial, we agree with the district court that his decision to focus on residual doubt was objectively reasonable. At the

state habeas proceeding, Townley articulated his decision-making process as follows:

> Q: And what strategy did you eventually decide upon in the mitigation portion of this trial?
>
> A [Townley]: Well, again, with the jury that we had and knowing the history of the juries in that area, the residual doubt, the non intentional nature of the actual death. . . .
>
> Q: Your first witness was Lewis Evans with the G.B.I., top polygraphist?
>
> A: Correct.
>
> Q: How did that fit into your strategy in the penalty portion?
>
> A: The residual doubt question.
>
> Q: How did you feel that would impact upon the death part, his testimony?
>
> A: That the jury had actually stayed out for a fairly substantial amount of time on guilt innocence, enough such that you knew there was some disagreement in the jury room. It would take a lot of time just to review all the physical evidence and documents that came in, but it went beyond that, which let me know that there were some jurors who had questions about his, a finding of guilt. And my feeling was that the polygraph, and hitting that first out of the shoot, might immediately with those jurors cause concern about whether they had done the right thing or the

> wrong thing in coming back with a guilty verdict.

R1-6, Exh. 62 at 335-36. We previously have catalogued those cases in our circuit in which we have noted the effectiveness of the residual doubt defense. *See Parker v. Sec'y for the Dep't of Corr.*, 331 F.3d 764, 787-88 (11th Cir. 2003) (noting that "[c]reating lingering or residual doubt over a defendant's guilt is not only a reasonable strategy, but 'is perhaps the most effective strategy to employ at sentencing' "); *Stewart v. Dugger*, 877 F.2d 851, 856 (11th Cir. 1989) ("Trial counsel made a strategic decision that in light of the atrocious nature of the offense, [the defendant's] only chance of avoiding the death penalty was if some seed of doubt, even if insufficient to constitute reasonable doubt, could be placed in the minds of the jury. . . . Trial counsel cannot be faulted for attempting to make the best of a bad situation."). In sum, we agree with the district court that the state courts' conclusion that trial counsel was not deficient is not contrary to nor an unreasonable application of Supreme Court precedent. Because we conclude that trial counsel's performance at the sentencing phase of Ward's trial was not deficient, we need not consider *Strickland*'s prejudice prong. *See Holladay*, 209 F.3d at 1248.

### D. Ineffective Assistance of Counsel for Failure to Obtain an Independent Mental Health Expert

Ward argues that his trial counsel provided ineffective assistance by failing to obtain an independent mental health expert for the defense team. He contends that his trial counsel declined to obtain such an expert even though Ward's mental health was at issue and the trial judge had made funds available to the defense for the express purpose of obtaining a mental health expert. Ward challenges his trial counsel's reliance on the mental health evaluations ordered by the trial court and conducted by state experts who allegedly had a "bias and prejudice toward the State's position."[13] R1-6, Exh. 62 at 358. Moreover, Ward maintains that the mental health evaluation performed by the state experts was flawed in other respects, namely (1) that the purpose of the state's evaluation was to determine Ward's competence to stand trial and not to develop mitigating evidence; and (2) the state's experts were not provided with information concerning Ward's pornography collection or concerning his multiple crimes against other women.

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[13] After conducting their evaluation, the state mental health experts ultimately concluded that Ward suffered from anti-social personality disorder. At the state habeas proceeding, Ward's mental health expert, Dr. Mark Mills ("Mills") attempted to rebut that diagnosis and suggested that Ward suffered from fetishism instead.

The state habeas court made the following factual findings and legal conclusions regarding this claim:

> [Ward] claims that defense counsel were ineffective in failing to obtain the assistance of an independent mental health expert. The Affidavit of Dr. Mark J. Mills is offered as evidence that the diagnosis of antisocial personality disorder was incorrect. However, it is clear that Dr. Mills' diagnosis of fetishism was based upon incomplete information, thus this testimony is not persuasive.
>
> Although the trial court granted defense counsels' Motion for Funds for Employment of Privileged, Competent Psychiatrist, "not every offer extended by the court must be accepted by defense counsel." *Curry v. Zant*, 258 Ga. 527, 528, 371 S.E.2d 647 (1988). The decision not to retain an independent mental health expert was based on several factors, including [Ward's] strong opposition to the presentation of any type of mental illness defense, the trial court's caveat that "counsel act[ ] reasonably in their selection and use of the expert," and the lack of indicators that a mental illness defense or mitigation evidence existed.
>
> Defense counsels' investigation into a potential mental illness defense and mitigation evidence was reasonable, as was the decision to pursue a trial strategy that did not require the retention of an independent mental health expert.

R1-6, Exh. 70 at 10-11 (citations omitted).

The district court concluded that the state habeas court's determination with regard to Ward's mental health expert ineffective-assistance-of-counsel claim was sound. According to the district court, Townley's decision not to obtain an independent mental health expert to evaluate Ward was sound trial strategy and his decision not to pursue further expert evaluation of Ward's mental condition was reasonable. The district court based its determination on Ward's stated opposition to any kind of mental illness defense and Townley's assessment that no viable mental illness defense was possible.

In its decision, the district court cited Townley's testimony at the state habeas proceeding regarding Ward's opposition to a mental illness defense.

> [H]is position was I didn't do it. And he didn't feel like there was anything basically that was, that he had any kind of mental illness that would be important to the issues that we were trying, and basically had real strong feelings that, if anything, it would make it look like he did it, and we were trying to say that he did it but he was mentally ill or he had these mental problems. He just had real strong reactions about it.

R4-77 at 92 (citing R1-6, Exh. 62 at 290). The district court also noted that doctors from two separate facilities – Northwest Georgia Regional Hospital and Central State Hospital – evaluated Ward over the years and both independently diagnosed him with anti-social personality disorder. Again looking to

Townley's testimony at the state habeas proceeding, the district court recounted how Townley believed the anti-social personality disorder diagnosis was harmful to Ward and, if presented in mitigation, would be seized upon by the state to good effect.

As regards other physical ailments that contributed to Ward's alleged mental illness, the district court noted that Townley testified that he was aware of Ward's prior automobile accident as well as his blackouts and headaches. The district court credited Townley's testimony that he duly investigated whether a possible head injury incurred in the automobile accident had any impact on Ward's mental capacity and noted that the tests performed on Ward indicated that no neurological abnormalities existed.

The district court also discussed Dr. Samuel Perri's ("Dr. Perri") conclusions after examining Ward prior to trial.[14] The district court noted that Dr. Perri's evaluation concluded that Ward did not present with any type of mental illness and highlighted Dr. Perri's later conclusion that Ward did not suffer from a multiple personality disorder. The district court summed up its analysis of the issue by relating

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[14] The trial court ordered that Ward "be evaluated for the purpose of rendering an opinion with respect to the questions of his competency to stand trial, his degree of criminal responsibility, his intellectual level of functioning, [and] neurological disorders. . . ." R1-6, Exh. 59 at 319. Dr. Perri was the Senior Psychologist and Director of Forensic Services at the Northwest Georgia Regional Hospital who conducted that evaluation.

Townley's testimony at the state habeas proceeding concerning his rationale for not pursuing a mental illness defense:

> A [Townley]: We had instructions from our client, plus I didn't find where we had anything that was of such significance that it was going to help us with the jury. And, if anything, I thought it might undermine our credibility somewhat with the jury.
>
> Q: And why would it undermine your credibility with the jury?
>
> A: I didn't feel that this jury would be receptive to seeing photographs of a terribly decomposed body, hearing lots of testimony concerning similar transaction evidence, seeing boxes of men's magazines and lingerie that was cataloged, and then coming in with something that wasn't pretty darn substantial on mental illness, that, if anything, I thought that it might hurt us, and that the jury first would feel like we were just trying to make excuses. . . .

R4-77 at 97-98.

The district court ultimately concluded that the state habeas court's decision to reject Ward's mental health expert ineffective-assistance-of-counsel claim was not contrary to clearly established law nor an unreasonable application of clearly established law. The district court also found that, given the nature and extent of the evidence before the jury, there existed no reasonable probability that Ward's sentence

would have been different even if Townley had obtained an independent medical health expert.

Our review of the record reveals no grounds for disturbing the district court's decision regarding Ward's mental health expert ineffective-assistance-of-counsel claim. We find Townley's conclusion that no viable mental illness defense existed eminently reasonable given the circumstances at the time of the trial. First, the record affirms Townley's assertion that he discussed the issue of a possible mental illness defense with Ward on multiple occasions and was repeatedly rebuffed. Second, we are impressed with the fact that Townley continued to investigate the possibility of a mental illness defense after the proposal was scotched by Ward. We reference Townley's testimony during the state habeas proceedings where he describes a memorandum in which he memorialized his communications with Dr. Perri.

> A [Townley]: Apparently, this was a memo to the file from some discussions or communications with Dr. Perri. "Ward does not know that [Townley] considers it a possibility. Doesn't want Ward to know [Townley] thinks he may have mental problems. Will give you details if you need them. . . . In this case the evidence is overwhelming that he did it. He is facing the death penalty. We can probably work out a plea where he will not get the chair but Ward will not let him," which is myself, "do so. Is adamant that he is not guilty."
>
> Q: Let me ask you this, Mr. Townley, in relation to that. Despite the fact that he was

> adamant and he didn't want you to pursue any type of mental health defense, did you nevertheless still question doctors and investigate that?
>
> A: Yes.

R1-6, Exh. 62 at 294-95.

The record also supports Townley's assertion that he was not able to develop a viable mental illness defense and consequently elected not to pursue such a defense at trial. Hence, in Townley's estimation, the necessity of an independent mental health expert was much reduced. We consider the circumstances presented to Townley before the trial commenced. His client adamantly opposed any mental illness defense. A court-ordered mental evaluation of Ward yielded no indication that Ward suffered from mental illness[15]

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[15] Dr. Perri made the following findings regarding Ward's alleged neurological abnormalities stemming from a previous automobile accident:

> On March 12, 1991 Mr. Ward was referred to Central State Hospitals' Department of Neurology. During this evaluation Mr. Ward stated that he was in an automobile accident in July of 1989 in which he hit the windshield. Subsequently he complained of headaches, nausea, vomiting and some visual problems. He also reported having four blackout spells since September of 1990. However, the neurological examination which included an EEG, brain scan, and skull series were within the normal limits and no neurological abnormalities were found.

R1-6, Exh. 59 at 320.

and follow-up conversations with the state psychologists confirmed that assessment. Although Townley continued to investigate the possibility of a mental illness defense even after the idea was rejected by his client, Townley ultimately concluded that the defense was not viable. Indeed, in his reasoned opinion, the presentation of any evidence of mental illness during the sentencing phase of the trial would have been seized upon by the state, who, in turn, "would have used [it] to drive Mr. Ward directly to the chair." R1-6, Exh. 62 at 313. Moreover, we are not persuaded by the affidavit testimony of Ward's habeas mental health expert, Dr. Mills. As we have held many times before, "the mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial." *Davis v. Singletary,* 119 F.3d 1471, 1475 (11th Cir. 1997). We conclude that the district court correctly determined that the state courts' conclusion that trial counsel was not deficient is not contrary to nor an unreasonable application of Supreme Court precedent. Again, because we conclude that trial counsel's performance was not deficient, we do not reach the prejudice prong of the *Strickland* analysis.

E. Improper Bailiff-Jury Communication

Ward next argues that his constitutional right to a fair trial and a reliable sentence were violated when a bailiff improperly responded to a juror's question

about parole during the penalty phase of trial. We agree.

Three jurors submitted affidavits on this issue and one of those jurors testified live at a state habeas hearing. Juror Kenneth Craig's affidavit indicates that he personally questioned a bailiff as to whether life without parole was a sentencing option:

> One of the things that I know I was worried about was whether he would ever be able to get out and do something like this again. I really did not think that he deserved the death penalty, partly because I had some strong doubts about his guilt. But I believed at the time – and other jurors shared this belief – that a life sentence meant that he would be able to get out on parole after a while.
>
> Before we sentenced Ward to death, I asked one of the bailiffs – a woman I think – if life and death were our only options. I wanted to know whether life really meant life and, if it didn't mean life, whether there was a life without parole choice. But the bailiff told me that jurors couldn't ask questions like that, that the judge's instructions were what we had to go on. I never got an answer to my question.
>
> . . . .
>
> Today I wish that we had had the choice of sentencing Ward to life without the possibility of parole. I know that if we had had that

> choice, I would definitely have voted for a life sentence, because I just wanted to be sure that a person like him would be off the streets, whether or not he was actually guilty of the crime.

R1-6, Exh. 65 at 882-83.

Similarly, juror Keith Dunsmore signed an affidavit stating that the jury asked a bailiff about the possibility of sentencing Ward to life without parole:

> Other jurors also had some uneasiness with the death penalty in this case. We certainly did not want Mr. Ward to be out on the street. I remember that we asked a bailiff whether we could sentence Mr. Ward to life without the possibility of parole. The bailiff returned with the answer that such a sentence was not an option. If the life without parole option had been available at the time, I and other jurors may well have decided that this was the appropriate sentence.

*Id.* at 888. Dunsmore later testified at a state habeas hearing that, although he could not recall if he asked the bailiff or another juror the question about life without the possibility of parole, the issue was "talked about, and we found out that we couldn't do it, as a jury we couldn't do that." R1-6, Exh. 64 at 722-23.

Finally, juror James Hix submitted an affidavit reflecting some jurors' concern that Ward might

commit future crimes if released from prison someday:

> One of the things I and the other jurors were especially concerned about was the possibility that Mr. Ward might get out of prison someday and commit another violent crime. We just didn't think that a life sentence truly meant life, and that he would eventually get out of prison. If we had had the option of life without the possibility of parole as a sentence, I would have seriously considered a life sentence.

R1-6, Exh. 65 at 885-86. Hix's affidavit does not mention any questions posed by the jury to a bailiff on the issue of parole eligibility.

The state habeas court ruled that the jurors' affidavits were inadmissible under O.C.G.A. § 17-9-41 because the affidavits sought to impeach the jury's verdict and did not fall within any exception to the rule. The court also found the affidavits were irrelevant because life without parole was not a sentencing option at the time of Ward's trial, and thus it did not matter whether the jurors wished in hindsight that it had been an option. Finally, the court noted that "the discussion with the Bailiff, as stated by the jurors, is not the sort that – perhaps it should have been reported to the judge, and then from the judge to the lawyers, but the deputy's response was a proper response, and no harm done." R1-6, Exh. 61 at 24.

With respect to Dunsmore's live testimony, the state habeas court likewise stated that it would not

consider his testimony, presumably for the same reasons that it excluded the affidavits. Specifically, the court told the parties that, "none of these affidavits, I want to make it clear, either yours or [the state's] or the testimony [of juror Dunsmore] that we are about to take under oath, are going to be considered by me at this point." R1-6, Exh. 64 at 707. Instead, the court explained that "they will be part of the record, not that I'm going to consider," but so that "[t]he appellate court can look at that issue." *Id.* at 707-09.

In its orders denying habeas relief, the state habeas court found this issue to be procedurally defaulted because it was not raised on direct appeal. The court found no "cause" to overcome the procedural bar because (1) there was no external factor to preclude Ward from previously raising the claim, and (2) Ward did not receive ineffective assistance of counsel. R1-6, Exh. 82 at 3. Additionally, the court found no actual prejudice to overcome the default. These conclusions were based on the court's findings that there was "no evidence that there was any question posed by the jury that was not answered by the trial court in open court, and no evidence to support [Ward's] allegation that a fifth question was asked about parole eligibility and not relayed to the trial judge." *Id.* Neither of the state court's orders mention the three jurors' affidavits or Dunsmore's live testimony.

The district court agreed with the state habeas court that this issue was procedurally defaulted, and

that Ward had not established cause or prejudice to excuse the default, nor a fundamental miscarriage of justice. In an abundance of caution, the district court later addressed the merits of Ward's claim. After reciting the state habeas court's findings and conclusions in full, the district court summarily concluded that the state habeas court's decision was not contrary to, or an unreasonable application of, clearly established federal law and that the decision was not based on an unreasonable determination of the facts.

The Sixth Amendment, made applicable to the states through the Fourteenth Amendment's Due Process Clause, protects a criminal defendant's right to a fair trial by a panel of impartial jurors. *Parker v. Gladden,* 385 U.S. 363, 364, 87 S. Ct. 468, 470, 17 L. Ed. 2d 420 (1966). Integral to this right is the requirement that a jury base its verdict on the evidence presented at trial. *See Turner v. State of Louisiana,* 379 U.S. 466, 472, 85 S. Ct. 546, 549, 13 L. Ed. 2d 424 (1965). "This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Id.*

A jury is presumed to have acted impartially. *See United States v. Siegelman,* 561 F.3d 1215, 1237 (11th Cir. 2009) (per curiam). A defendant may rebut this presumption by making a colorable showing that juror exposure to extraneous information has violated his right to an impartial jury. *See id.* If such a showing is made, then prejudice is presumed. *See id.* This presumption of prejudice applies to "any private

communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury . . . if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." *Remmer v. United States,* 347 U.S. 227, 229, 74 S. Ct. 450, 451, 98 L. Ed. 654 (1954). A presumption of prejudice is not conclusive, however. *Id.* The government may rebut the presumption by showing that the improper communication was harmless. *See id.*; *Siegelman,* 561 F.3d at 1237.

We must initially determine whether Ward has procedurally defaulted this claim by failing to raise it prior to his state habeas proceedings. "Whether a particular claim is subject to the doctrine of procedural default . . . is a mixed question of fact and law, which we review de novo." *Judd,* 250 F.3d at 1313. The state habeas court relied on Georgia's procedural default rule as stated in *Turpin v. Todd,* 268 Ga. 820, 493 S.E.2d 900 (Ga. 1997):

> A procedural bar to asserting a claim on habeas corpus arises if the defendant failed to timely object to any alleged error or deficiency at trial or on appeal. The procedural bar, however, may be overcome if the petitioner shows, first, an adequate cause for failing to raise the issue earlier and second, actual prejudice resulting from the alleged error or errors.

*Todd,* 493 S.E.2d at 905 (footnotes omitted); *see also* O.C.G.A. § 9-14-48(d). Ward argues that because

*Todd* was decided five years after the Georgia Supreme Court affirmed Ward's conviction and sentence, Georgia's procedural default rule was not firmly established and consistently followed at the time of Ward's trial and direct appeal. Consequently, Ward contends that *Todd* was not an adequate basis for the state habeas court's procedural default ruling.

We disagree. A state procedural bar is based on an adequate state procedural rule if that rule is "firmly established and regularly followed – that is, not applied in an arbitrary or unprecedented fashion." *Lynd v. Terry,* 470 F.3d 1308, 1313 n.4 (11th Cir. 2006) (per curiam). *Todd* was based on the well-established precedent of *Black v. Hardin,* 255 Ga. 239, 336 S.E.2d 754, 755 (Ga. 1985), which was decided six years *before* Ward's trial. *See Todd,* 493 S.E.2d at 905 n.12. In *Black v. Hardin,* the Georgia Supreme Court held that a defendant will be procedurally barred in habeas from raising "*any* alleged error or deficiency" not timely objected to at trial or raised on appeal, unless the defendant can show cause and actual prejudice to overcome the default, or that a miscarriage of justice would result if the error is not considered. *Hardin,* 336 S.E.2d at 755. *Todd* merely applied *Black v. Hardin* in holding that Todd's failure to raise a juror-bailiff claim on direct appeal resulted in the claim's procedural default. *See Todd,* 493 S.E.2d at 905. Georgia's procedural default rule was thus firmly established and consistently followed prior to Ward's trial and appellate proceedings. Accordingly, we conclude that the state habeas court's

procedural default ruling rested on an adequate state law ground. *See Lynd,* 470 F.3d at 1313-14 (concluding that Georgia's procedural default rule, as stated in *Black v. Hardin,* provided an adequate and independent state law ground for denial of a claim).

Because the claim is procedurally defaulted, Ward must establish cause and actual prejudice to excuse his default. *See Jefferson v. Hall,* 570 F.3d 1283, 1309 (11th Cir. 2009). Ward argued in state court that the cause requirement was satisfied by the bailiff's failure to report the jury's question to the court and to the parties. Alternatively, Ward claimed that cause was established by the ineffective assistance of his counsel in failing to raise the issue in the motion for new trial or on direct appeal. As noted, the state habeas court rejected both arguments.

We disagree with the state habeas court's conclusion that Ward has not shown sufficient cause to overcome the procedural bar. "Cause exists if there was 'some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule.'" *Mize v. Hall,* 532 F.3d 1184, 1190 (11th Cir. 2008) (quoting *Murray,* 477 U.S. at 488, 106 S. Ct. at 2645). An external impediment includes "interference by state officials" that prevented a petitioner from raising a claim. *Id.*; *see also Murray,* 477 U.S. at 488, 106 S. Ct. at 2645. The external impediment in this case stems from the failure of the bailiff and/or the trial judge to inform Ward or his counsel about the jury's question concerning parole.

We recognize that the state habeas court found no evidence that the jury asked any question that was not answered by the trial judge in open court, but this finding is "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). As discussed earlier, we must presume the state court's factual findings to be correct unless the petitioner rebuts that presumption by clear and convincing evidence. *See id.* § 2254(e)(1); *Parker v. Head,* 244 F.3d 831, 835-36 (11th Cir. 2001). Clear and convincing evidence entails proof that a claim is "highly probable," a standard requiring more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *United States v. Owens,* 854 F.2d 432, 436 n.8 (11th Cir. 1998) (quotation marks and citation omitted). The Supreme Court described this standard as "demanding but not insatiable" and cautioned that "[d]eference does not by definition preclude relief." *Miller-El v. Dretke,* 545 U.S. 231, 240, 125 S. Ct. 2317, 2325, 162 L. Ed. 2d 196 (2005) (quotation marks and citation omitted).

Here, the jurors' affidavits and Dunsmore's testimony contain clear and convincing evidence that the jury questioned a bailiff about the possibility of sentencing Ward to life without parole, and that the answer was not given in open court. Both Craig and Dunsmore stated in their affidavits that a juror asked the bailiff whether the jury could sentence Ward to life without parole. Craig stated that he himself asked that question. In his live testimony, Dunsmore

could not recall who asked the question but he knew that "it was talked about and we found out we couldn't do it, as a jury we couldn't do that." R1-6, Exh. 64 at 722-23. According to both Craig and Dunsmore's affidavits, the bailiff responded to the jury's question. It is unclear from the record whether the bailiff's answer was dictated by the trial court or was merely a response from the bailiff.[16] Either way, it is undisputed that the trial court did not instruct the jury not to consider parole, as was required under Georgia law at that time once a question about parole was asked. *See Quick v. State*, 256 Ga. 780, 353 S.E.2d 497, 503 (Ga. 1987) ("If, and only if, the jury asks to be instructed about the possibility of parole, the court should mention the issue only to the extent of telling the jury in no uncertain terms that such matters are not proper for the jury's consideration.")

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[16] The state asserts that juror Dunsmore testified that he "saw the bailiff go into the judge's chamber, give the judge the question [about life without parole] and return with the answer from the judge." Brief of Respondent/Appellee at 56. This is an inaccurate rendition of Dunsmore's testimony, however. Dunsmore testified that it was his impression that questions asked of the bailiff by the jury were given to the trial judge for an answer. R1-6, Exh. 64 at 723. When asked how he got that impression, Dunsmore testified, "If I remember, one occasion we saw them actually go to the Judge's room and give him the question and came back from it. They had told us that they had gotten the answer from the Judge." *Id.* at 724. Dunsmore was not asked, nor did he specify, which jury question this recollection addressed.

The state habeas court erroneously determined that the jurors' affidavits, insofar as they pertained to this issue, were inadmissible under O.C.G.A. § 17-9-41. The latter rule prohibits the use of jurors' affidavits to impeach their verdict. *See* O.C.G.A. § 17-9-41. However, the Georgia Supreme Court has held that a bailiff's comments to a juror concerning a defendant's parole eligibility constitutes an exception to this rule. *See Todd,* 493 S.E.2d at 903. This is because "the general prohibition against allowing a jury to impeach its verdict cannot be applied to emasculate a defendant's constitutional right to a fair trial, particularly when his life hangs in the balance." *Id.*[17] In *Todd,* which was decided shortly before Dunsmore testified at the final state habeas hearing, the Georgia Supreme Court specifically rejected the idea that the rule against impeaching verdicts precluded the habeas court from considering the affidavits of three jurors about a bailiff-jury communication concerning parole. *See id.* at 902-03. Like the juror affidavits in *Todd,* the juror affidavits here alleged a bailiff-jury communication about the possibility of parole which pertained to Ward's right to a fair trial. The state

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[17] Similarly, the United States Supreme Court has noted that an exception to the common-law rule barring juror testimony to impeach a verdict includes situations where an extraneous influence affected the jury's deliberations, such as a bailiff's improper comments about the defendant's guilt in *Parker,* 385 U.S. at 363-66, 87 S. Ct. at 470-71. *See Tanner v. United States,* 483 U.S. 107, 117, 107 S. Ct. 2739, 2745-46, 97 L. Ed. 2d 90 (1987).

habeas court therefore erred in excluding the affidavits under O.C.G.A. § 17-9-41.

Furthermore, there is no contrary evidence in the record to refute the jurors' affidavits that a jury-bailiff exchange occurred on the issue of parole. When these affidavits are considered, in addition to Dunsmore's live testimony, it is clear that the state court's findings are incorrect and "an unreasonable determination of the facts in light of the evidence presented[.]"[18] 28 U.S.C. § 2254(d)(2); compare *Crowe v. Hall,* 490 F.3d 840, 847 (11th Cir. 2007) (concluding that the petitioner failed to rebut the presumed correctness of the state habeas court's factual finding because in opposition to the one juror affidavit alleging an improper bailiff comment, the record contained denials that the incident occurred from three other jurors and two bailiffs). Accordingly, we conclude that Ward established sufficient cause to excuse his procedural default based on the state's concealment of the jury's question regarding parole.[19]

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[18] Specifically, we find incorrect the state habeas court's findings of "no evidence that there was any question posed by the jury that was not answered by the trial court in open court, and no evidence to support [Ward's] allegation that a fifth question was asked about parole eligibility and not relayed to the trial judge." R1-6, Exh. 82 at 3.

[19] Given our conclusion, we need not address Ward's alternative argument that cause was established by his counsel's ineffective assistance in failing to raise this claim on appeal.

Ward must still demonstrate actual prejudice. *See Jefferson,* 570 F.3d at 1309. Actual prejudice means more than just the possibility of prejudice; it requires that the error "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady,* 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 816 (1982). In *Frady,* the Court found no actual prejudice because there was "no substantial likelihood" that the jury would have found the defendant guilty of manslaughter instead of first degree murder "if only the malice instructions had been better framed[.]" *Id.* at 172, 102 S. Ct. at 1596. Moreover, "even if the law presumes prejudice for certain errors when they are timely raised, a convicted defendant who is seeking to overcome a procedural bar does not have the benefit of that presumption of prejudice, and must instead meet the actual prejudice test set forth in *Frady.*" *Jefferson,* 570 F.3d at 1309. Yet whether we apply a presumption of prejudice or undertake a specific analysis, "the ultimate inquiry" remains the same: "Did the intrusion affect the jury's deliberations and thereby its verdict?" *United States v. Olano,* 507 U.S. 725, 739, 113 S. Ct. 1770, 1780, 123 L. Ed. 2d 508 (1993).

In light of the uncontroverted evidence presented, we conclude that Ward was actually prejudiced by the improper bailiff-jury communication. All three juror affidavits express a concern that Ward would be released on parole if he were sentenced to life imprisonment. This concern was great enough to prompt the

jury to ask a bailiff whether Ward could be sentenced to life without the possibility of parole. Instead of the trial court dispelling any consideration of parole through a curative instruction,[20] the bailiff responded to at least one juror that life without parole was not an option. This was information that the bailiff should not have given and that the jury should not have considered under Georgia law at that time. *See Quick*, 353 S.E.2d at 503 (reaffirming that "a defendant's parole eligibility is not, and ought not to be, an issue considered by the jury in the sentencing phase of a death penalty case"). More importantly, this improper exchange violated Ward's Fourteenth Amendment due process right to have the jury decide his punishment based on the evidence presented in court, in accordance with the rules and instructions of the court and with the full knowledge of the parties. *See Parker*, 385 U.S. at 364, 87 S. Ct. at 470; *Remmer*, 347 U.S. at 229, 74 S. Ct. at 451.

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[20] The Georgia Supreme Court suggested that a trial court give the following instruction if a juror asked about the possibility of parole:

> "You shall not consider the question of parole. Your deliberations must be limited to whether this defendant shall be sentenced to death or whether he shall be sentenced to life in prison. You should assume that your sentence, whichever it may be, will be carried out."

*Quick*, 353 S.E.2d at 503 n.3. In Ward's case, although the trial court instructed the jury to presume that Ward would spend the rest of his life in prison if sentenced to life imprisonment, the jury was never instructed that it should not consider parole.

By advising that life without parole was not an option, the bailiff left the impression that Ward could or would be released on parole if the jury sentenced him to life imprisonment.[21] The bailiff therefore reinforced the pre-existing belief of Craig and other jurors that "a life sentence meant that [Ward] would be able to get out on parole after a while." R1-6, Exh. 65 at 882. Furthermore, the bailiff's response affected the deliberations of, at a minimum, three jurors.[22] According to Dunsmore, if life without parole had been available at the time, "I and other jurors may well have decided that this was the appropriate sentence." R1-6, Exh. 65 at 888. Likewise, Hix states that he "would have seriously considered a life sentence" if life without parole was an option. *Id.* at 886. Craig expresses the strongest sentiment, asserting that "I would definitely have voted for a life sentence" had the option of life without parole existed. *Id.* at 883. These statements reflect that the jury not only considered parole in determining Ward's sentence, but that a key factor in the sentencing decision of several jurors was the bailiff's instruction that the

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[21] Although a jury could not sentence a capital defendant to life without parole at the time of Ward's conviction, it is undisputed that the Georgia Board of Pardons and Parole had the discretion to deny him parole. Thus, it was possible that Ward would have spent the rest of his life in prison if he had been sentenced to life imprisonment.

[22] Even if only three jurors were influenced by the bailiff's comments, the Supreme Court has emphasized that a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Parker*, 385 U.S. at 366, 87 S. Ct. at 471.

jury could not sentence Ward to life without the possibility of parole.

The state argues that no actual prejudice can be shown because life without parole was not an option for Ward under Georgia law at that time, and thus any instruction to this effect was a correct statement of the law. This argument ignores the fact that the jury was not supposed to be considering parole in the first place. *See Quick*, 353 S.E.2d at 503. It also ignores the fact that Georgia law required the court to instruct the jury "in no uncertain terms" not to consider parole once it asked a question about parole. *Id.* Finally, this argument ignores the violation of Ward's Sixth Amendment right to be sentenced by jurors who are free from external influence and who render their verdict solely on the basis of the evidence presented during trial. *See Parker*, 385 U.S. at 363-66, 87 S. Ct. at 470-71 (concluding that a bailiff's comments that a defendant was guilty and that the Supreme Court would correct "anything wrong" violated the defendant's Sixth Amendment right to an impartial and unprejudiced jury).

Bearing in mind that only one vote in favor of life imprisonment was needed to avoid a death sentence, we conclude that there is a substantial likelihood that the jury would not have returned a death verdict had the trial court, in lieu of the bailiff's response, properly instructed the jury in open court not to consider parole. *See Turpin v. Todd*, 271 Ga. 386, 519 S.E.2d 678, 683 (Ga. 1999) (affirming the habeas court's finding that a defendant was actually prejudiced by a bailiff's

response to a juror's question about parole because, inter alia, the issue of parole played a major role in the sentencing phase deliberations and the jury was never instructed that parole must not be considered). Put simply, we find a substantial likelihood that the improper bailiff-jury communication prejudiced Ward's chances of being sentenced to life imprisonment. Compare *Frady*, 456 U.S. at 174, 102 S. Ct. at 1597-98 (finding "no substantial likelihood the erroneous malice instructions prejudiced Frady's chances with the jury").

Given that Ward has established cause and actual prejudice to overcome his procedural default, we may now determine whether a constitutional violation merits habeas relief. Ward has made a colorable showing that the jury was exposed to extraneous information when the bailiff informed a juror that life without parole was not a sentencing option. Such exposure is presumptively prejudicial. *See Remmer*, 347 U.S. at 229, 74 S. Ct. at 451; *Siegelman*, 561 F.3d at 1237. As noted earlier, the government may rebut this presumption by carrying its heavy burden of showing that the improper communication was harmless. *See Siegelman*, 561 F.3d at 1237. "An error is harmless unless there is a reasonable likelihood that [it] affected the defendant's substantial rights." *United States v. Khanani*, 502 F.3d 1281, 1292 (11th Cir. 2007) (quotation marks and citation omitted). Reversal requires that the error had "a substantial influence on the outcome of the case." *Id.* In assessing harmless error, we must consider all the

circumstances, including any jurors' testimony, the nature of the extrinsic evidence, the manner in which the extrinsic evidence reached the jury, and the strength of the government's case. *See id.* at 1291; *Siegelman*, 561 F.3d at 1237.

An assessment of these factors yields the conclusion that the improper communication was not harmless in this case. The nature of the extrinsic evidence concerned the possibility of parole. As we have explained, the jury's consideration of this issue was strictly forbidden by Georgia law, *see Quick*, 353 S.E.2d at 503, and an infringement of Ward's constitutional due process right to have the jury base its verdict on the evidence presented at trial. *See Parker*, 385 U.S. at 364, 87 S. Ct. at 470; *Remmer*, 347 U.S. at 229, 74 S. Ct. at 451. The manner in which this evidence reached the jury – through the bailiff – also weighs against a finding of harmless error. The Supreme Court has recognized that "the official character of the bailiff – as an officer of the court as well as of the State – beyond question carries great weight with a jury[.]" *Parker*, 385 U.S. at 365, 87 S. Ct. at 470; *see also Johnson v. Wainwright*, 778 F.2d 623, 627 (11th Cir. 1985) (noting that "a bailiff's exercise of his official duties is likely to give him added legitimacy in the eyes of a jury"). The fact that a bailiff provided the extrinsic evidence to the jury here enhances the likelihood that the jury credited and relied on this information.

With respect to the strength of the government's case, the Georgia Supreme Court stated only one

sentence: "The evidence, although circumstantial, supports the conviction." *Ward*, 417 S.E.2d at 134. Both Craig and Dunsmore stated in their affidavits that the circumstantial nature of the evidence created doubts about Ward's guilt. Dunsmore went so far as to say that, "I really did not think that he deserved the death penalty, partly because I had some strong doubts about his guilt." R1-6, Exh. 65 at 882. During the penalty phase, the state relied on the facts of the crime to argue that the killing involved a depraved mind and torture to the victim, thereby supporting the statutory aggravator of an outrageous or wantonly vile murder. The jury did not find this statutory aggravator, however. Instead, it based its death verdict on Ward's prior conviction for a capital felony and its finding that Ward committed the murder while committing another capital felony (kidnaping with bodily injury). The circumstantial nature of the government's case and the lack of overwhelming evidence bolster our conclusion that there is a reasonable likelihood the improper bailiff-jury communication affected Ward's constitutional due process right to a fair penalty phase hearing and a reliable sentence. Consequently, the error was not harmless.

We do not take lightly our decision to reverse a death sentence rendered by a jury eighteen years ago. Nevertheless, the record establishes that the improper bailiff-jury communication violated Ward's constitutional rights and prejudiced him. Accordingly, he is entitled to a new penalty phase hearing.

F. *Brady* Claims

Ward next contends that the state withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. at 87, 83 S. Ct. at 1196-97. Specifically, Ward relies on three alleged *Brady* violations. First, Ward alleges that the state failed to turn over a report that might have been used to impeach the testimony of a key state witness. Second, Ward contends that the state withheld investigative notes which undermined the state's assertion at trial that Ward had made an unexpected visit to the victim's house – ostensibly to check on a well. Third, Ward argues that the state suppressed evidence that someone else committed the murder for which he was convicted.

Ward initially raised his *Brady* claim in his direct appeal to the Georgia Supreme Court.[23] Ward again raised the claims in his first amended state habeas petition, albeit in a different structure. In his post-evidentiary hearing brief in support of his amended state habeas petition, Ward fashioned his *Brady* claims in a form substantially similar to that now before us.

The state habeas court made the following findings and conclusions with regard to Ward's *Brady* claims:

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[23] At this stage, Ward's claim was not fully developed and touched only on the first of Ward's three *Brady* violations.

[Ward] alleges that the State failed to provide defense counsel with the following items of evidence, in violation of *Brady v. Maryland,* 373 U.S. 83 (83 S. Ct. 1194, 10 L. Ed. 2d 215) (1963):

A. Calhoun City police officer's report regarding GBI Agent's questioning of [Ward] in the Donna Rich case.

B. GBI Agent's reports regarding criminal incidents where [Ward] was a suspect, but the victims could not identify him as the perpetrator.

C. Walker County deputy sheriff's notes regarding reports that the victim had been seen leaving the house in her car, crying, with an unidentified person.

D. Walker County deputy sheriff's note stating that the victim had expected someone to come over and check the well.

E. Face sheet for GBI polygraph of Jerry Wayne Alexander, stating the reason for his questioning regarding the fire at Richard Puryear's house.

F. Walker County deputy sheriff's note stating that Puryear had said the victim's gown was in the house that burned.

G. Donna Rich's guilty plea in Floyd County to a theft by taking charge.

H. Walker County deputy sheriff's notes regarding the daughter of the victim responding to the sight of other men.

I. Walker County deputy sheriff's notes regarding the victim's background.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady, supra* at 87, 83 S. Ct. 1194. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Rogers v. State,* 257 Ga. 590, 592 (3), 361 S.E.2d 814 (Ga. 1987), quoting *United States v. Bagley,* 473 U.S. 667 (105 S. Ct. 3375, 87 L.E.2d 481) (1985).

After consideration of each of these items of evidence in the context of the case as presented to the jury, the Court finds no reasonable probability that the result would have been different with their disclosure. As [Ward] has not established a *Brady* violation, his claims under *Giglio v. United States,* 405 U.S. 150 (92 S. Ct. 763, 31 L. Ed. 2d 104) (1972), also fail.

R1-6, Exh. 70 at 12-14.

The district court next entertained the claims. After reciting the state habeas court's findings, the district court concluded that the state habeas court's "rejection of [Ward's] claims relating to the alleged

suppression of evidence was not contrary to, or an unreasonable application of, clearly established federal law, and was not based on an unreasonable determination of the facts." R4-77 at 66-67.

As correctly summarized by the state habeas court, *Brady* counsels that once a defendant requests the discovery of any favorable evidence material to either guilt or sentence, the prosecution's suppression of such evidence, whether in good or bad faith, violates due process. *See Brady,* 373 U.S. at 87, 83 S. Ct. at 1196-97. The prosecution's duty extends beyond disclosing such favorable evidence to "learn[ing] of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley,* 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995). We note that this duty exists whether or not the prosecution knew of the existence of the evidence if the evidence was in the possession of the government or generally provided only to governmental entities. *See Martinez v. Wainwright,* 621 F.2d 184, 186-87 (5th Cir. 1980). We also have held that there is no suppression if the defendant knew of the information or had equal access to obtaining it. *See Maharaj v. Sec'y for the Dep't of Corr.,* 432 F.3d 1292, 1315 n.4 (11th Cir. 2005).

We are well acquainted with the standard for establishing a *Brady* violation. In order to be successful, a petitioner must show that: (1) the prosecution possessed evidence favorable to the accused, because it was either exculpatory or impeaching, and did not

disclose it to the defense; "(2) that evidence must have been suppressed by the state, either willfully or inadvertently; and (3) prejudice must have ensued." *Kelley v. Sec'y for the Dep't of Corr.*, 377 F.3d 1317, 1354 (11th Cir. 2004). "Evidence is material so as to establish prejudice only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotation marks and citation omitted).

We review the district court's decision regarding Ward's *Brady* claims de novo, by determining whether the state habeas court, in denying the claims, "misapplied Supreme Court precedent or unreasonably determined the material facts." *Gary v. Hall*, 558 F.3d 1229, 1256 (11th Cir. 2009). After careful consideration of the record, we agree with the district court and conclude that the state habeas court's rejection of Ward's *Brady* claims was not contrary to, or an unreasonable application of, Supreme Court precedent, and was not based on an unreasonable determination of the facts. We address each alleged *Brady* violation in turn.

1. Impeachment Evidence

Ward contends that he has made the requisite showing of materiality with regard to a report ("Jackson report") by Randy Jackson, a police officer with the Calhoun City Police Department. He maintains

that had he had the allegedly withheld report at trial, "the result of the proceeding would have been different." *Kelley,* 377 F.3d at 1354. According to Ward, the Jackson report could have been used to impeach the trial testimony of Special Agent Del Thomasson ("Thomasson"). Thomasson and Jackson conducted an interview with Ward about Ward's participation in a different crime (the Donna Rich kidnaping and rape)[24]. During the interview, Ward made incriminating statements about the Gilbreath murder. At pretrial hearings on the voluntariness of Ward's statement, Thomasson testified that Ward first broached the subject and it was only at that point that Thomasson followed up with questions about the Gilbreath murder. Ward argues that the allegedly suppressed Jackson report contradicts Thomasson's testimony at the pretrial hearing. Armed with the Jackson report, Ward maintains that his statement to Jackson and Thomasson likely would have been suppressed, thus undermining confidence in the outcome of his trial.

The Jackson report consists of one type-written page and reads as follows:

> On 01-18-90 at approx. 10:45 AM, I talked with James Ray Ward after he requested to see me without his attorney.
>
> I readvised James Ray Ward of his Constitutional Rights and verbally advised he could

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[24] Special Agent Keith Sitton also was present during the interview in question.

only talk to me if he fully understood that since an attorney was already appointed I couldn't talk to him. He stated he knew and he signed the bottom of the form again which stated a request from him to talk to me about rape without his attorney. G.B.I. Agents Sitton and Thomason [sic] were present.

Jamie stated he wanted to talk to me about an electrical instrument taken in a search of his residence and that it was not the one used. He stated the stun gun was supposed to be still there in the house as far as he knew. I told him I only had pictures of what he described and the sheriff office, to my knowledge, still had it.

Jamie was talking a lot about what had happened and I advised him that our investigation was complete. Jamie then stated, do you want to clear up a lot of crimes, felonies and misdemeanor's [sic] you haven't arrested anyone on yet. At this time Agent Thomason [sic] asked him, what kind, and asked him did he know anything about the rape and murder of a lady in Walker Co.

Jamie gave a story of his childhood and gave statements acknowledging he knew her but would not directly say he killed her. Indirectly he would talk about black out spells because of liquor and anphetamines [sic], comtemplating [sic] suicide, and would say he couldn't remember going there. Jamie couldn't explain why he had what item's [sic]

Walker Co. and G.B.I. had recovered from his residence; denying he knew of them.

R1-6, Exh. 65 at 909.

At the hearing, Thomasson stated the following[25]:

A [Thomasson]: [Ward] went in, as the statement says, went into sort of a rambling conversation with Mr. Jackson, and continued on for several minutes, and then, he subsequently turned to me, Detective Jackson or o[n] side, and I was sitting over on the other side, in a chair, and that is when he turned to me and addressed the Gilbreath investigation.

Q: Did you do anything to bring that to his attention?

A: No, sir, I did not.

Q: Did you ask him any questions in relation to the Gilbreath matter?

A: No, sir, I did not.

Q: Did you interrogate him or drop a word at that point or say anything to or anything he could have construed as a question?

A: No, sir, not until after he brought it up that is when I began to talk to him about it.

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[25] We note that, prior to the commencement of the interview, Thomasson was introduced to Ward as the agent investigating the Gilbreath murder.

R1-6, Exh.6 at 347. Thomasson's testimony largely mirrors that of Agent Sitton, who was also present during the interview. According to Sitton,

> [a]fter [Ward] was mirandized, he wanted to talk to Investigator Jackson about some type of pain device that was taken from the house, and inquired as to that, and then gave a statement as to his background, the problems that he has had, and wanted some detail about the alcohol and drugs and then he focused his attention to Agent Thomasson, talking about the Walker County case [the Gilbreath murder].

R1-6, Exh. 6 at 260. Finally, we find it significant that Ward's excerpt from the Jackson report presented in his initial brief on appeal to us redacts language that, in our view, is highly relevant: "Jamie then stated, do you want to clear up a lot of crimes, felonies and misdemeanor's [sic] you haven't arrested anyone on yet." R1-6, Exh. 65 at 909. After careful consideration of the whole record, we are confident in our assessment that the Jackson report was not material, especially in light of the fact that Ward was on notice that the Gilbreath murder investigation was on Thomasson's plate before he offered to "clear up" additional crimes that had not been solved. Consequently, we conclude that Ward has not made a sufficient showing to establish a *Brady* violation with regard to the report.

2. Investigative Notes Concerning Unexpected Well Visit

Ward's next argument concerns Thomasson's testimony at trial that Ward admitted going to the Gilbreath home a second time ostensibly to check on a previously drilled well. At trial, the prosecution presented testimony from Billy Joe Gilbreath, the victim's husband, that he had had no problems with the well and had not requested anyone to come check on it. This testimony was corroborated by Fred Dukes, another employee of Jefford's Well Drilling.[26] Moreover, Roland Jeffords, the owner of Jefford's Well Drilling also testified that he had never sent Ward over to check on the Gilbreath's well. Ward claims that a handwritten note discovered in the Walker County Sheriff Department's files during post-conviction proceedings undermines the prosecution's contention at trial that Ward only visited the Gilbreath household in order to case the house for a future kidnaping.

The handwritten note in question reads as follows:

1-7-90 215.

Glenn & Angela Gilbreath

[Address]

had well drilled by Jeffords

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[26] Ward was employed by Jefford's Well Drilling at the time of Gilbreath's murder.

had pump trouble – son came in

had to put 3 different pumps in.

No one even stopped by to check pump/well w/o being called.

One day got off work early, Angela went to Nikia's to p.u. Elaina (baby)

Nikia babysitting at time for Elaina

Nikia mentioned expecting someone over to check well/pump

Angela works 1st shift

R1-6, Exh. 65 at 958. This note is substantially similar, however, to a typewritten report the defense received before trial. The typewritten report stated: "Angela stated that one day when she got off work early, she had gone to Nikia's to pick up their daughter, Elaina, who Nikia was babysitting for during that time period. She stated that Nikia had mentioned to her something about someone had stopped over at the Gilbreath residence to check the well and pump." Appellee's Brief at 63-64.

After comparing the handwritten note and the typewritten report and considering them in the context of the trial testimony of Billy Joe Gilbreath, Fred Dukes and Roland Jeffords, we confess to being unable to follow the chain of logic urged upon us by Ward. Ward contends that the handwritten note's use of the word "expecting" somehow indicates that Ward's second trip to the Gilbreath well was

authorized. That argument ignores the remainder of the handwritten note and the other trial testimony directly relating to the matter. Indeed, the first portion of the handwritten note strongly suggests that someone other than an employee of Jefford's Well Drilling handled the Gilbreath's well issues: "had pump trouble – son came in . . . No one even stopped by to check pump/well w/o being called." In our view, given the strength of the evidence indicating that Ward was neither requested nor authorized to check on the Gilbreath well, the handwritten note is of limited significance. We do not hesitate in concluding that even had the handwritten note been disclosed to the defense, the result of the proceeding would not have been different. Consequently, because we find that the handwritten note in question is immaterial, Ward's *Brady* claim must fail.

### 3. Evidence that Someone Else Committed the Murder

As stated in Ward's initial brief to us, part of Ward's counsel's trial strategy was to raise doubts about Ward's guilt by presenting evidence implicating Jerry Wayne Alexander.[27] Ward contends that the state suppressed two pieces of material evidence which later surfaced during post-conviction proceedings: (1) a Polygraph Services Unit – Face Sheet

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[27] Jerry Wayne Alexander was initially the prime suspect in the Gilbreath murder.

("Face Sheet"); and (2) handwritten investigative notes from Walker County investigators Sam Haskett and Keith Smith. Ward maintains that these pieces of evidence demonstrate Alexander's involvement in the Gilbreath murder and therefore undermine confidence in Ward's guilty verdict.

The Face Sheet includes the following information:

> On August 24, 1989, during the early morning hours, an unoccuped [sic] dwelling house owned by Richard Puryear totally burned. Even though no definite cause of the fire could be pinpointed, arson was suspected. Jerry Alexander, a friend of Richard Puryear, had helped Puryear remodel the house and had spent the night in the house on several occasions during the past three months. He reportedly last stayed in it on August 21, 1989. Alexander is the prime suspect in the murder/rape of Nikia Gilbreath, who lived near the Puryear house. He was interviewed by GBI agents on August 23, 1989, and was asked about the contents of the house. During the interview with Alexander it was mentioned that the house would probably be searched. It burned only a few hours after the interview.

R1-6, Exh. 65 at 965. Next, we consider the investigative notes in question. The notes apparently memorialize a conversation between Haskett and Smith and Lannie Cox, the State Fire Marshal who investigated the Puryear house fire and ruled it an "undetermined

fire." R1-6, Exh. 31 at 2758. The notes read as follows:

> Said Puryear told him victim's gown was in the house that burned that was the reason it burned.
>
> Machine went haywire when ask if anything of victim's was in the house.

R1-6, Exh. 65 at 911.

Ward asserts that the Face Sheet and the investigative notes, when viewed in tandem, demonstrate Alexander's complicity in Gilbreath's murder. We disagree. Ward's argument requires one inferential leap too many. First, we are to infer that Alexander was in possession of the victim's gown. Then we must conclude that Alexander secreted the gown in Puryear's house. Finally, we are urged to accept Alexander as the arsonist responsible for burning down Puryear's residence. We are to do this in the face of no evidence that a nightgown was missing from the Gilbreath household, no evidence that Alexander took the nightgown from the residence, and no evidence that Alexander set fire to the Puryear house – the official investigation into the fire concluding that the cause was "undetermined." Moreover, there is also the testimony of Jerry Michael Morris, Sr. to consider. Morris performed extensive investigative work for the defense and specifically was tasked with looking into Alexander's alleged complicity in the Gilbreath murder. His testimony is illuminating:

> Q: What type of evidence were you able to develop as far as Mr. Alexander being the person who committed this crime?
>
> A [Morris]: Nothing really beyond what the State had already developed. In other words, say the interview with Mr. Alexander, I received basically the same information that had been furnished to law enforcement regarding his version of the time period that the homicide had occurred.
>
> . . . .
>
> Q: So would it be fair to say that you tracked down every lead that came to you?
>
> A: That I had presented to me or that I developed, yes, sir.

R1-6, Exh. 61 at 51, 53. We conclude that neither the Face Sheet nor the handwritten investigative notes are material for the purposes of Ward's *Brady* claim. Even had they been available to the defense at trial, in our view the results of the proceeding would not have been different.

Finally, Ward urges us to find both the state habeas court and the district court's resolution of his *Brady* claims are contrary to the clearly established Supreme Court precedent of *Kyles v. Whitley*. Ward contends that neither court sufficiently examined the cumulative effect of the allegedly suppressed evidence, but only considered each piece independently. Even assuming that the state habeas court did not consider the evidence cumulatively for materiality

purposes, we have and conclude that the evidence, considered cumulatively, is not material.[28] Consequently,

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[28] We have explained our cumulative materiality analysis before.

> Cumulative analysis of the force and effect of the undisclosed pieces of favorable evidence matters because the sum of the parts almost invariably will be greater than any individual part. Whether the sum of the withheld evidence favorable to the defense will be enough to create a reasonable probability that the jury would have acquitted will depend on two factors. One factor is the net inculpatory weight of the evidence on both sides that actually was presented at trial. The other factor is the aggregate effect that the withheld evidence would have had if it had been disclosed. These two factors are brought to bear at the crucial second step of the materiality process, which begins with putting on the scales the evidence that was presented at trial – evidence favoring the prosecution on one side, that favoring the defense on the other. Then the force and effect of all of the undisclosed exculpatory evidence is added to the weight of the evidence on the defense side, while the force and effect of all the undisclosed impeachment evidence is subtracted from the weight of the evidence on the prosecution's side.
>
> Once the evidence on the scales is adjusted to take into account the combined force and effect of the undisclosed evidence favorable to the defense, the standard that is applied is not one of sufficiency of evidence to convict. It is instead whether what is left on both sides of the scale after adjusting for the withheld evidence creates a reasonable probability that a jury would acquit, and a reasonable probability is one sufficient to undermine our confidence in the guilty verdict.

*Smith v. Sec'y for the Dep't of Corr.*, 572 F.3d 1327, 1347 (11th Cir. Jun.30, 2009).

we find no merit in Ward's "cumulative effect" argument.

G. Unanimity Instruction

Ward next challenges the trial court's unanimity instruction. He contends that the trial court's instruction conveyed to the jury the impression that they had to agree unanimously before considering any particular mitigating factor, and that the Georgia Supreme Court's failure to recognize this error constituted an unreasonable application of the Supreme Court's precedent in *Mills v. Maryland,* 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988).

Ward first raised his unanimity claim on direct appeal to the Georgia Supreme Court. *See* R1-6, Exh. 42 at 184. The Georgia Supreme Court addressed the claim and concluded that "[t]he trial court properly charged the necessity for unanimity in the jury's verdict." *Ward,* 417 S.E.2d at 138. The state habeas court found Ward's unanimity instruction claim barred, "as the Supreme Court of Georgia found on direct appeal that the trial court's charge . . . was proper." R1-6, Exh. 70 at 19. The district court agreed and concluded that the Georgia Supreme Court's finding was not contrary to, or an unreasonable application of, clearly established federal law, an [sic] that its conclusion was based on a reasonable determination of the facts.

In *Mills v. Maryland,* the Supreme Court held that it was error to instruct the jury that they were

required to agree unanimously on the existence of mitigating factors before they could consider them. *See Mills,* 486 U.S. at 384, 108 S. Ct. at 1870. Our review of the trial court's instructions with regard to both the unanimity requirement and mitigating circumstances reveals no *Mills* violation. During the sentencing phase, the trial court first instructed the jury regarding its consideration of mitigating circumstances:

> Mitigating circumstances also differ from aggravating ones because you are not required to be convinced, beyond a reasonable doubt, that a mitigating circumstance exists, but you must take that circumstance into account as you deliberate this case. You must consider a mitigating circumstance if you believe that there is any evidence to support it.

R1-6, Exh. 39 at 5062. Later, after discussion of the verdict form, the court gave the following instruction on the unanimity requirement: "Whatever your verdict is in this case, it must be unanimous, just as during the guilt/innocence phase, and it must be agreed to by all twelve of you. . . ." *Id.* at 5065. We discern no error here. The trial court's unanimity instruction only pertained to the jury's verdict. The jury was never instructed that it had to agree unanimously on the existence of a particular mitigating circumstance before it could be considered. Ward's construction of the trial court's instructions strains credulity and we cannot credit it. Accordingly, we conclude that the district court did not err in finding

that the Georgia Supreme Court's determination was neither contrary to nor an unreasonable application of *Mills v. Maryland*.

## III. CONCLUSION

Based on the foregoing, we conclude that the district court correctly denied habeas relief on those claims challenging the validity of Ward's convictions. We therefore AFFIRM Ward's convictions. We further conclude that the district court erred in denying habeas relief on Ward's claim of an improper bailiff-jury communication during the penalty phase. Accordingly, we REVERSE his death sentence and REMAND for a new sentencing phase hearing. The district court's decision denying Ward's petition for a writ of habeas corpus is AFFIRMED in part and REVERSED in part.

**AFFIRMED in part and REVERSED in part.**

EDMONDSON, Circuit Judge, concurs in the result.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

James Ray Ward,

Petitioner,

v.

Derrick Schofield, Warden,
Georgia Diagnostic Prison,

Respondent.

CIVIL ACTION FILE
NO. 4:04-CV-0106-HLM

ORDER

(Filed Aug. 15, 2005)

This is a federal petition for a writ of habeas corpus filed by a state prisoner pursuant to 28 U.S.C.A. § 2254. The case is before the Court on the Court's December 7, 2004, Order.

## I. Background

On August 3, 1990, a grand jury indicted Petitioner in the Superior Court of Walker County, Georgia, for the July 17, 1989, murder of Nikia Gilbreath, the kidnaping with bodily injury of Nikia Gilbreath, and feticide. (Resp't's Ex. 1 at 5.) On June 24, 1991, Petitioner's case proceeded to a trial before a jury. On July 12, 1991, the jury issued a verdict of guilty as to all counts of the indictment. (Resp't's Ex. 1 at 796; Resp't's Ex. 39 at 5088-90.) The jury sentenced Petitioner to death. (Resp't's Ex. 39 at 5088-90.)

Petitioner appealed his convictions and sentences to the Supreme Court of Georgia. (Resp't's Ex. 42.) Petitioner enumerated the following errors on direct appeal: (1) the evidence was insufficient to convict Petitioner; (2) the trial court improperly excluded polygraph evidence during the guilt/innocence phase of Petitioner's trial; (3) the trial court erroneously admitted as similar transaction evidence testimony concerning Petitioner's alleged obscene telephone call to Patsy Hall; (4) the trial court improperly admitted as similar transaction evidence testimony concerning Petitioner's alleged theft of a gift and a purse from Lisa Bain's vehicle and unidentified hang-up telephone calls to Lisa Bain; (5) the trial court erroneously allowed as similar transaction evidence testimony concerning Petitioner's alleged indecent exposure to Susan Hayes; (6) the trial court impermissibly admitted as similar transaction evidence testimony concerning Petitioner's alleged theft of Recca Cobb's billfold from her truck; (7) the trial court erroneously admitted as similar transaction evidence testimony concerning Petitioner's alleged assault of Linda Carter Creager at a motel; (8) the trial court improperly allowed as similar transaction evidence testimony concerning Petitioner's alleged assault of Kathy Smith Henson at an ATM; (9) the trial court erroneously admitted as similar transaction evidence testimony concerning Petitioner's kidnaping and rape of Donna Rich; (10) the trial court permitted Robert Hazelwood, an expert witness for the State, to present hearsay testimony and to testify concerning the significance of the alleged similar transactions; (11)

the State's closing argument attempted to shift the burden of proof to Petitioner and commented on Petitioner's choice not to testify; (12) the State's closing argument misled the jury concerning the protection afforded to witnesses and verbally "lashed" Petitioner for exercising his right to cross-examine the witnesses presented against him, including Donna Rich; (13) the State, in its closing argument, argued facts not in evidence concerning the background of defense counsel and the prosecutor's personal experiences growing up in the area; (14) the State, in its closing argument, suggested that other supportive reasons existed for convicting Petitioner that the State could not present to the jury; (15) in the State's closing argument, the prosecutor impermissibly implied that he was telling the truth; (16) the State's closing argument dehumanized Petitioner and inflamed the passions and prejudices of the jury; (17) the trial court erroneously refused to grant a mistrial based on the prosecutorial misconduct during the State's closing argument; (18) the trial court permitted the State to argue the impact of the alleged crime on the victim's family; (19) the trial court deprived Petitioner of due process by allowing the State to argue that the victim was sexually abused prior to her death or that her death was related to a sexual assault, even though no evidence supported this argument; (20) the trial court erroneously denied Petitioner's motion to suppress evidence obtained during searches of Petitioner's residence; (21) the trial court improperly allowed into evidence handwriting analyses where the exemplar was a written

statement by Petitioner that was taken in violation of Petitioner's right to have counsel present; (22) the trial court failed to suppress a January 18, 1990, statement made by Petitioner during a conversation with officers after Petitioner had asserted his right to counsel; (23) the death penalty was impermissible, because no evidence indicated that Petitioner intended to kill the victim; (24) the death penalty was not permissible, because Petitioner was mentally ill; (25) the trial court erroneously denied Petitioner's motion for a change of venue; (26) Petitioner's due process rights were violated by the Georgia criminal procedure allowing the district attorney, in his sole discretion, to deny Petitioner the right to a probable cause hearing; (27) the trial court impermissibly sentenced Petitioner for both murder and feticide; (28) the trial court's statutory voir dire questions conflicted with Petitioner's constitutional right to a presumption of innocence; (29) the trial court did not permit Petitioner to inquire into the manner in which the grand jury returned the indictment against him; (30) the trial court denied Petitioner's special demurrer challenging a sexually-biased indictment form; (31) the trial court admitted gruesome photographs of the victim; (32) the denial of Petitioner's motion to recuse the trial judge deprived Petitioner of his due process rights; (33) the trial court denied Petitioner's challenge to the array of the grand jury and the traverse jury; (34) the trial court erroneously refused to declare O.C.G.A. § 17-10-36 and the Unified Appeal Procedure unconstitutional; (35) the trial court improperly excluded from the jury pool members of the

population who did not favor the death penalty; (36) the trial court improperly excused certain jurors for alleged conscientious objections to the death penalty; (37) the trial court erroneously refused to strike for cause certain jurors who demonstrated bias or predisposition and who indicated that they would not give realistic consideration to a life sentence; (38) the trial court denied Petitioner's motion to strike a second jury for sentencing purposes; (39) the trial court allowed the State to introduce evidence at the sentencing phase of Petitioner's trial concerning Petitioner's previous convictions for non-capital felonies; (40) the trial court's jury charge imposed a mandatory presumption concerning witness credibility; (41) the trial court's jury charge on similar transactions improperly allowed the jury to consider Petitioner's general past, criminal bent of mind, and mental state; (42) the trial court impermissibly refused to charge the jury at sentencing concerning the definition and application of the term "reasonable doubt"; (43) the trial court erroneously charged the jury that kidnaping is a capital felony and may constitute an aggravating circumstance; (44) the trial court failed to instruct the jury that it could not consider general societal deterrence when imposing the death penalty; (45) the trial court improperly charged the jury concerning Petitioner's prior record of a conviction for an aggravated felony, as the conviction for the kidnaping and rape of Donna Rich occurred after the alleged kidnaping and murder of Nikia Gilbreath; (46) the trial court did not instruct the jury concerning the presumption of a life

sentence; (47) the trial court did not charge the jury that unadjudicated criminal activities used to aggravate punishment must be proven beyond a reasonable doubt; (48) the trial court's charge concerning engagement in the commission of another capital felony during the commission of a murder was inappropriate, as the alleged aggravating circumstance was kidnaping with murder, which was the basis for the felony murder charge; (49) the trial court failed to charge the jury to consider Petitioner's mental capacity or emotional disturbance; (50) the trial court did not charge the jury concerning residual doubt; (51) the trial court did not explain properly the unanimity requirement for a verdict of death; (52) the trial court improperly admitted Petitioner's prior guilty pleas without a showing that those pleas were knowing and voluntary; and (53) the trial court improperly admitted as a similar transaction evidence of "crank" telephone calls to Anna Wallin, who could not identify the "crank" caller.

On June 11, 1992, the Georgia Supreme Court affirmed Petitioner's convictions and sentences. *Ward v. State,* 262 Ga. 293, 417 S.E.2d 130 (1992). On July 2, 1992, the Georgia Supreme Court denied Petitioner's motion for reconsideration.

Petitioner filed a petition for a writ of certiorari with the United States Supreme Court. (Resp't's Ex. 46.) On January 19, 1993, the Supreme Court denied Petitioner's petition for a writ of certiorari. *Ward v. Georgia,* 506 U.S. 1985 (1993). Petitioner filed a petition for re-hearing (Respondent's Ex. 49), which

the Supreme Court denied on March 8, 1993. *Ward v. Georgia,* 507 U.S. 980 (1993).

On April 19, 1993, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. (Resp't's Ex. 51.) On July 31, 1997, October 21, 1997, October 22, 1997, and December 22, 1997, the Butts County Superior Court conducted evidentiary hearings with respect to Petitioner's habeas corpus petition. (Resp't's Exs. 59, 61-66.) In his habeas corpus petition, Petitioner asserted the following claims: (1) the Butts County Superior Court deprived Petitioner of the opportunity for a full and fair evidentiary hearing because: (a) the court denied funds to Petitioner to investigate issues and to retain expert assistance; (b) the court refused to grant a continuance of the evidentiary hearing to allow Petitioner to present additional critical evidence to the court; (c) the court blocked Petitioner's efforts to subject some of the forensic evidence in the case to DNA testing; (d) the court improperly restricted inquiry into *Brady* material; and (e) the court did not give Petitioner the opportunity to confront and cross-examine Respondent's witnesses whose testimony Respondent offered by affidavit after the evidentiary hearing; (2) improper communication occurred between the bailiffs and jurors in Petitioner's trial, because a high degree of familiarity and informal interaction existed between the bailiffs and the jurors, and the bailiffs engaged in improper ex parte communications with the jury, including answering a question posed by the jury foreman concerning the

meaning of a life sentence and the availability of a sentence of life without parole; (3) Petitioner's trial counsel rendered ineffective assistance of counsel by: (a) opening the door to gruesome photographs of the victim's body at the site of its discovery; (b) failing to obtain DNA testing of blood on a quilt belonging to the victim and discovered at Petitioner's home; (c) failing to investigate and to present evidence of Petitioner's traumatic childhood and Petitioner's positive character traits; (d) failing to obtain a competent, independent mental health expert; (e) failing to secure the services of an expert in offender profiling to rebut the testimony of Robert Hazelwood; (f) failing to move to strike for cause jurors with obvious, fixed opinions that Petitioner automatically should receive the death penalty if the jury convicted Petitioner of murder; (g) failing to move to strike for cause jurors who indicated that Petitioner would have to convince them why he should live; (h) failing to move to strike for cause jurors who indicated that knowing that Petitioner was accused of other crimes might influence their decisions; (i) failing to move to strike for cause juror Kenneth Craig, who informed the court after the trial began that he was acquainted with State witness Anna Wallin, and that she had described to him the events about which she testified; (j) failing to move to strike juror Joy Cheatwood, who was not a resident of Walker County, Georgia; (k) failing to move to strike for cause juror Laura Berry, who stated during voir dire that she had "read up" on "what God tells" about murder on the preceding night; (l) failing to move to strike for cause juror

Gaynelle Brock, who expressed strong opinions concerning Petitioner's guilt; (m) failing to obtain other expert assistance; (n) telling potential jurors during voir dire that Petitioner was not insane; (o) failing to conduct an adequate pretrial investigation into the State's case and Petitioner's available defenses; (p) failing to investigate properly Petitioner's unadjudicated criminal offenses; (q) failing to investigate properly the underlying facts pertaining to Petitioner's prior convictions; (r) failing to challenge properly Petitioner's Floyd County, Georgia, guilty plea to the alleged rape and kidnaping of Donna Rich; (s) failing to object to the trial court's misstatement at voir dire that there might be another part of the trial if Petitioner was found guilty; (t) failing to object to the trial court's erroneous jury charge concerning the unanimity requirement; (u) failing to conduct their own mental health evaluation to support their motion that a guilty but mentally ill verdict precluded a death sentence; (v) failing to conduct an independent mental health evaluation to support their request for a jury instruction requiring the jury to consider Petitioner's mental capacity or emotional disturbance; (w) failing to pursue a guilty but mentally ill defense; (x) failing to cross-examine adverse witnesses aggressively and adequately; (y) failing to challenge false and misleading testimony offered by the State's witnesses; (z) failing to make specific objections concerning the State's improper closing arguments; (aa) failing to counsel Petitioner properly concerning the option of pleading guilty in exchange for a life sentence; and (bb) lacking knowledge and

familiarity concerning procedural and substantive federal and state laws concerning the trial of a death penalty case; (4) the State suppressed exculpatory and favorable evidence, including criminal records of State witnesses, evidence contradicting CBI Agent Del Thomasson's testimony concerning an interview of Petitioner on January 18, 1990, and a relating statement, evidence concerning crime victims who could not identify Petitioner as the perpetrator, evidence contracting the State's theory that the victim was bound and gagged before being taken from her home, evidence indicating that Petitioner's visit to the victim's residence to check on her well was not unexpected, evidence strongly pointing to the guilt of another suspect, Jerry Wayne Alexander, the prior conviction of State witness Donna Rich and the related plea colloquy, and evidence concerning other potential suspects; (5) Petitioner was actually innocent of the charges against him; (6) the trial court improperly allowed the introduction of evidence of unadjudicated offenses, and denied Petitioner's requested jury instruction concerning those offenses; (7) the trial court improperly excluded jurors who indicated that they were opposed to the death penalty; (8) the trial court failed to exclude jurors who had obvious, fixed opinions that if Petitioner was convicted of murder, he automatically should receive a death sentence and jurors who indicated that Petitioner would have to convince them why he should live; (9) the trial court failed to remove jurors who indicated that they would expect Petitioner to prove his innocence, jurors with obvious, fixed opinions concerning

Petitioner's guilt, and jurors who indicated that knowing Petitioner was accused of other crimes would influence their decisions; (10) the trial court failed to excuse juror Kenneth Craig after he informed the trial court that he knew Anna Wallin and that he previously had discussed with her the incident that was the subject of her testimony; (11) the trial court excused jurors for hardship generously if those jurors indicated they would be sympathetic to Petitioner; (12) the trial court denied Petitioner's motion for a change of venue; (13) the trial court refused to give Petitioner's requested jury instructions concerning: (a) consideration of Petitioner's mental capacity or emotional disturbance; (b) residual doubt; (c) the unanimity requirement for a death verdict; (d) the definition and application of reasonable doubt; and (e) the presumption of a life sentence; and (14) Petitioner was denied due process because his trial was fraught with procedural and substantive errors and the trial court, defense counsel, and prosecutorial misconduct deprived Petitioner of a fair trial.

On August 27, 1998, the Butts County Superior Court denied Petitioner's habeas corpus petition. (Resp't's Ex. 70.) Petitioner filed a motion for reconsideration, which the Butts County Superior Court subsequently denied. (Resp't's Exs. 71-72.)

On October 28, 1998, Petitioner filed an application for a certificate of probable cause to appeal with the Georgia Supreme Court. (Resp't's Ex. 74.) On February 20, 2001, the Georgia Supreme Court remanded Petitioner's habeas corpus petition to the

Butts County Superior Court for further review of the reasonableness of counsels' conduct "regarding scientific testing of apparent blood stains" on the victim's quilt, allowing for questioning of trial counsel, testing of the blood, and further evidentiary development concerning the bloodstain issue. (Resp't's Ex. 77.) The Georgia Supreme Court also directed the Butts County Superior Court to clarify the portion of its order that rejected Petitioner's claim that the bailiffs in his case had not been sworn. (*Id.*) Respondent filed a motion for reconsideration of the Georgia Supreme Court's decision, which was denied on April 6, 2001. (Resp't's Exs. 78-79.)

On remand, DNA testing was conducted on the bloodstains at issue. (Resp't's Ex. 82.) The Butts County Superior Court issued a second order making additional findings as required by the remand order and denying Petitioner's habeas corpus petition. (*Id.*)

Petitioner filed a second application for a certificate of probable cause to appeal with the Georgia Supreme Court. (Resp't's Exs. 84, 87.) On April 30, 2003, the Georgia Supreme Court denied Petitioner's second application for a certificate of probable cause to appeal. (Resp't's Ex. 89.)

On September 26, 2003, Petitioner filed a petition for a writ of certiorari with the United States Supreme Court. (Resp't's Ex. 90.) On December 1, 2003, the Supreme Court denied Petitioner's petition for a writ of certiorari. (Resp't's Ex. 92.) Petitioner

filed a petition for re-hearing, which the Supreme Court also denied. (Resp't's Exs. 93-94.)

On April 29, 2004, Petitioner filed his § 2254 Petition. Petitioner asserts the following claims: (1) improper communication between the bailiffs and the jury and other jury-related errors deprived Petitioner of his constitutional rights, and Petitioner's trial and appellate counsel were ineffective for failing to litigate those issues adequately (Petitioner's § 2254 Petition, Claim 1 & n.2); (2) Petitioner's due process rights were violated by the State's suppression of exculpatory and otherwise favorable, material evidence including criminal records of State witnesses, memoranda concerning interviews of similar transaction witnesses, evidence contradicting the State's theory that the victim was bound and gagged before removal from her home, evidence indicating that the victim was expecting someone to check her well, evidence supporting the theory that Jerry Wayne Alexander was the perpetrator of the crime, and documents indicating the existence of other suspects, and Petitioner's trial and appellate counsel provided ineffective assistance in relation to this claim (*id.* Claim 2 & n.7); (3) Petitioner's trial counsel rendered ineffective assistance of counsel by: (a) allowing the introduction of graphic photographs of the victim's body into evidence (*id.* Claim 2A); (b) failing to investigate and to present mitigating evidence at sentencing concerning Petitioner's traumatic childhood and his positive character traits (*id.* Claim 2B); (c) failing to obtain competent, independent mental health

expert assistance in preparing for trial and presenting evidence (*id.* Claim 2C); (d) failing to secure an expert in offender profiling to rebut the testimony of Robert Hazelwood (*id.* Claim 2D); (e) failing to move to strike for cause jurors with obvious, fixed opinions that Petitioner automatically should receive the death penalty if the jury convicted him of murder (*id.* Claim 2E); (f) failing to move to strike for cause jurors who indicated that Petitioner would have to convince them why he should live (*id.*); (g) failing to request that the trial court remove for cause jurors who indicated that knowing that Petitioner was accused of other crimes might influence their decisions (*id.*); (h) failing to remove for cause juror Kenneth Craig, who revealed during the trial that he was acquainted with State witness Anna Wallin, and that he had previously discussed with her the incident that was the subject of her testimony (*id.*); (i) failing to move to strike for cause juror Joy Cheatwood, who was not a resident of Walker County, Georgia (*id.*); (j) failing to move to strike for cause juror Laura Berry, who stated during voir dire that she had "read up" on what "God tells about murder and stuff like that" the previous evening (*id.*); (k) failing to move to strike for cause juror Gaynelle Brock after becoming aware of allegations that she had expressed strong opinions about Petitioner's guilt (*id.*); (l) failing to obtain expert assistance to rebut other contentions by the State (*id.*); (m) telling potential jurors during voir dire that Petitioner was not insane (*id.*); (n) failing to conduct an adequate pretrial investigation into the State's case and the defenses available to Petitioner

(*id.*); (o) failing to investigate properly the unadjudicated criminal offenses of which Petitioner was accused, and failing to litigate those issues properly (*id.*); (p) failing to investigate properly the underlying facts of Petitioner's prior convictions (*id.*); (q) failing to challenge properly Petitioner's Floyd County, Georgia, guilty plea to rape, kidnaping, aggravated sodomy, and burglary charges pertaining to Donna Rich (*id.*); (r) failing to object to the trial court's misstatement that there might be another part of the trial if the jury found Petitioner guilty (*id.*); (s) failing to object to the trial court's erroneous unanimity instruction (*id.*); (t) failing to conduct their own mental health evaluation of Petitioner to support their motion for a determination that a person found to be guilty but mentally ill could not receive the death penalty (*id.*); (u) failing to pursue an independent mental health examination of Petitioner to support their request for a jury instruction concerning consideration of Petitioner's mental capacity or emotional disturbance (*id.*); (v) failing to pursue a guilty but mentally ill defense at Petitioner's trial (*id.*); (w) failing to cross-examine adverse witnesses aggressively and adequately at trial (*id.*); (x) failing to challenge the false and misleading testimony of the State's witnesses at trial (*id.*); (y) failing to make specific objections to certain portions of improper, prejudicial, and unconstitutional arguments made by the State during both phases of Petitioner's trial (*id.*); (z) failing to counsel Petitioner properly concerning the option of pleading guilty in exchange for a life sentence (*id.*); (aa) lacking knowledge of and

familiarity with the procedural and substantive federal and state law concerning the trial of a death penalty case, and failing to apply that law effectively to Petitioner's case through competent pretrial preparation and investigation (*id.*); (4) Petitioner is actually innocent of the charges against him, and Petitioner's trial counsel failed to litigate that issue adequately (*id.* Claim 4 & n.30); (5) the trial court improperly admitted evidence of unadjudicated offenses allegedly committed by Petitioner and denied a proper instruction guiding the jury's consideration of that evidence, and Petitioner's trial and appellate counsel failed to litigate those issues adequately (*id.* Claim 5 & n.31); (6) the trial court improperly excused jurors for opposition to the death penalty, and trial and appellate counsel rendered ineffective assistance in relation to this claim (*id.* Claim 6 & n.32); (7) the trial court improperly failed to exclude potential jurors with obvious, fixed opinions that if Petitioner was convicted of murder, he automatically should receive the death penalty and jurors who indicated that Petitioner would have to convince them why he should live, and trial and appellate counsel provided ineffective assistance in connection with this claim (*id.* Claim 7 & n.34); (8) the trial court failed to remove for cause jurors who indicated that they would expect Petitioner to prove his innocence, jurors with obvious, fixed opinions concerning Petitioner's guilt, and jurors who indicated that knowing that Petitioner was accused of other crimes would influence their decisions, and trial and appellate counsel were ineffective in connection with this claim

(*id.* Claim 8 & n.35); (9) the trial court failed to remove for cause juror Kenneth Craig, who knew State witness Anna Wallin and who had discussed the incident with Ms. Wallin that formed the basis of her trial testimony, and trial and appellate counsel failed to litigate this issue adequately (*id.* Claim 9 & n.36); (10) the trial court excused jurors for hardship, resulting in a jury pool that was not a fair cross-section of society by reducing the proportion of the jury pool who appeared to be sympathetic to the defense, resulting in a jury panel that was biased in favor of convicting Petitioner and imposing the death penalty, and trial and appellate counsel failed to litigate this issue adequately (*id.* Claim 10 & n.37); (11) the trial court failed to grant Petitioner's motion for a change of venue, and Petitioner's trial and appellate counsel failed to litigate that issue adequately (*id.* Claim 11 & n.38); (12) the trial court failed to give the jury proper instructions, including: (a) failing to instruct the jury that it must consider Petitioner's mental capacity or emotional disturbance (*id.* Claim 12 ¶ 2); (b) refusing to give Petitioner's requested instruction concerning residual doubt (*id.* ¶ 3); (c) failing to give the proper instruction concerning the unanimity requirement for a death sentence (*id.* ¶ 4); (d) impermissibly commenting on Petitioner's silence by stating, "There might be some legitimate reason why Ray Ward did not testify, and you are not to speculate in this regard" (*id.* ¶ 5); (e) refusing to charge the jury at trial and sentencing concerning the definition and application of "reasonable doubt" (*id.* ¶ 6); and (f) refusing to give Petitioner's requested instruction concerning the

presumption of a life sentence (*id.* ¶ 7), and Petitioner's trial and appellate counsel failed to litigate those issues adequately (*id.* n.39); (13) the trial court refused to admit polygraph evidence relating to Jerry Wayne Alexander during the guilt and sentencing phases of Petitioner's trial, and Petitioner's trial and appellate counsel failed to litigate the issue of admission of polygraph evidence adequately (*id.* Claim 13 & n.40); (14) the trial court improperly allowed admission of similar transaction evidence, including: (a) evidence of an obscene telephone call purportedly made by Petitioner to Patsy Hall (*id.* Claim 14 ¶ 2.a.); (b) testimony concerning Petitioner's alleged theft of a gift and a purse from Lisa Bain's vehicle and unidentified hang-up telephone calls to Lisa Bain (*id.* ¶ 2.b.); (c) testimony concerning Petitioner's alleged indecent exposure to Susan Hayes (*id.* ¶ 2.c.); (d) the testimony concerning Petitioner's alleged theft of Recca Cobb's billfold from her truck (*id.* ¶ 2.d.); (e) testimony concerning Petitioner's alleged assault of Linda Carter Creager at a motel (*id.* ¶ 2.e.); (f) testimony concerning Petitioner's alleged assault of Kathy Smith Henson at an ATM (*id.* ¶ 2.f.); and (g) testimony concerning Petitioner's kidnaping and rape of Donna Rich (*id.* ¶ 2.g.), and Petitioner's trial and appellate counsel failed to litigate those issues adequately (*id.* n.41); (15) the trial court improperly permitted the testimony of Robert Hazelwood, and Petitioner's trial and appellate counsel failed to litigate that issue adequately (*id.* Claim 15 & n.42); (16) the State, during its closing argument, improperly commented on Petitioner's invocation of his right to

remain silent by arguing that Petitioner should have to explain: (a) how he obtained key pieces of evidence (*id.* Claim 16 ¶ 3.a.); (b) the circumstances surrounding Petitioner's guilty plea to the burglary of Donna Rich's residence (*id.* ¶ 3.b.); (c) why he was in the victim's house (*id.* ¶ 3.c.); (d) why he returned to the victim's house (*id.* ¶ 3.d.); (e) why certain people had recognized him (*id.* ¶ 3.e.); and (f) why he possessed a note from Anna Wallin (*id.* ¶ 3.f.), and Petitioner's trial and appellate counsel failed to litigate those issues adequately (*id.* n.44); (17) the State made improper and prejudicial closing arguments, including: (a) using the fact that Petitioner chose to exercise his right to confront the State's witnesses as a weapon against Petitioner (*id.* Claim 17 ¶ 2.a.); (b) arguing facts not in evidence, including the backgrounds of defense counsel and the prosecutor's own experiences growing up in the area (*id.* ¶ 2.b.); (c) injecting his own personal experiences (*id.* ¶ 2.c.); (d) arguing that other evidence existed to support Petitioner's guilt and the appropriateness of the death sentence that the State did not or could not present at trial (*id.* ¶ 2.d.); (e) presenting an argument that essentially made the prosecutor a witness and interjected his own personal opinion (*id.* ¶ 2.e.); (f) making arguments that dehumanized Petitioner (*id.* ¶ 2.f.); (g) making arguments that commented on Petitioner's right against self-incrimination (*id.* ¶ 2.g.); (h) making arguments that improperly attempted to shift the burden of proof to Petitioner (*id.* ¶ 2.h.); (i) making arguments that introduced matters that Petitioner did not have an opportunity to rebut *id.* ¶ 2.i.) (j)

making arguments that improperly appealed to the passions and prejudices of the jury (*id.* ¶ 2.j.); (k) making arguments concerning the impact on the victim's family (*id.* ¶ 2.k.); (l) making arguments concerning a sexual assault perpetrated on the victim before her death (*id.* ¶ 2.l.); and (m) arguing that the victim's death was related to a sexual assault (*id.* ¶ 2.m), and trial and appellate counsel failed to litigate those issues adequately (*id.* n.46); (18) unconstitutionally seized evidence was used against Petitioner at trial, and Petitioner's trial counsel failed to litigate that issue adequately (*id.* Claim 18 & n.47); (19) the trial court allowed introduction of testimony concerning a handwriting analysis that relied upon an unconstitutionally obtained statement by Petitioner as its exemplar, and Petitioner's trial and appellate counsel failed to litigate that issue adequately (*id.* Claim 19 & n.48); (20) the trial court failed to suppress an illegally obtained statement from Petitioner on January 18, 1990, and Petitioner's trial and appellate counsel failed to litigate that issue adequately (*id.* Claim 20 & n.50); (21) the death penalty was unconstitutionally imposed because no evidence supported a finding that Petitioner intended to kill the victim, and Petitioner's trial and appellate counsel failed to litigate that issue adequately (*id.* Claim 21 & n.51 & 52); (22) executing the mentally ill is cruel and unusual punishment, and trial and appellate counsel failed to litigate this issue adequately (*id.* Claim 22 & n.60); (23) the trial court denied Petitioner's motion for a change of venue, and

Petitioner's trial and appellate counsel failed to litigate that issues [sic] adequately (*id.* Claim 23 & n.61); (24) the district attorney was permitted to use his sole discretion to determine whether Petitioner would receive a probable cause hearing, and Petitioner's trial and appellate counsel failed to litigate that issue adequately (*id.* Claim 23 [sic] & n.62); (25) the trial court improperly sentenced Petitioner for both malice murder and feticide, and Petitioner's trial and appellate counsel failed to litigate that issue adequately (*id.* Claim 24 & n.63); (26) the trial court's voir dire questions conflicted with the presumption of innocence by requiring potential jurors to indicate whether they had an opinion regarding Petitioner's guilt, without asking whether the jurors had an opinion concerning Petitioner's innocence, and asking whether the jurors were evenly balanced for the State and for Petitioner, and Petitioner's trial and appellate counsel failed to litigate that issue adequately (*id.* Claim 25 & n.64); (27) the trial court prevented Petitioner from inquiring into the manner in which the indictment was returned against him, and Petitioner's trial and appellate counsel failed to litigate that issue adequately (*id.* Claim 26 & n.65); (28) the grand jury selection process used the term "foreman" instead of "foreperson," and Petitioner's trial and appellate counsel failed to litigate that issue adequately (*id.* Claim 26 [sic] & n.66); (29) the trial court impermissibly admitted gruesome photographs of the victim (*id.* Claim 27 & n.67); (30) the trial court improperly denied Petitioner's motion to recuse the trial judge, who was close friends with Judge Joe B.

Tucker, another Superior Court Judge in the Lookout Mountain Judicial Circuit, who was the uncle of the victim, and trial and appellate counsel failed to litigate this issue adequately (*id.* Claim 28 & n.68); (31) the grand jury and traverse jury in Petitioner's case were selected via an unsubstantiated means of selection, and Petitioner's trial and appellate counsel failed to litigate those issues adequately (*id.* Claim 28 [sic] & n.69); (32) the Unified Appeal Procedure was used in Petitioner's case, and Petitioner's trial and appellate counsel failed to litigate that issue adequately (*id.* Claim 29 & n.70); (33) death qualification of the jury denied Petitioner's rights to a fair and impartial jury, and Petitioner's trial and appellate counsel failed to litigate that issue adequately (*id.* Claim 30 & n.71); (34) the trial court failed to excuse for cause jurors who expressed a bias or predisposition toward the death sentence, and trial and appellate counsel failed to litigate that issue adequately (*id.* Claim 31 & n.72); (35) the trial court improperly permitted the introduction of Petitioner's prior criminal convictions, and trial and appellate counsel failed to litigate that issue adequately (*id.* Claim 32 & n.73); (36) the trial court gave an improper jury instruction by instructing the jury that all witnesses are presumed to be truthful unless and until they are convicted in some manner, which shifted the burden of proof to Petitioner, and trial and appellate counsel failed to litigate this issue adequately (*id.* Claim 33 & n.74); (37) the trial court gave a number of other improper jury instructions, including: (a) giving an erroneous jury charge concerning similar transactions

(*id.* Claim 34 ¶ 2.a.); (b) failing to charge the jury properly concerning reasonable doubt (*id.* ¶ 2.b.); (c) giving a charge on kidnaping and its corollary to a statutory aggravating circumstance (*id.* ¶ 2.c.); (d) failing to instruct the jury that it could not consider general societal deterrence in imposing a death sentence (*id.* ¶ 2.d.); (e) giving a charge that permitted the jury to consider a conviction of a prior felony as evidence to support a finding of a statutory aggravating circumstance (*id.* ¶ 2.e.); (f) failing to instruct the jury concerning the presumption of a life sentence (*id.* ¶ 2.f.); (g) failing to instruct the jury concerning the burden of proof required before finding that an unadjudicated prior crime can be considered in aggravation of punishment (*id.* ¶ 2.g.); (h) giving an instruction that allowed the jury to find Petitioner guilty of more than one crime based on the same evidence (*id.* ¶ 2.h.); (i) failing to instruct the jury properly concerning Petitioner's mental health as a potential mitigating circumstance (*id.* ¶ 2.i.); (j) failing to instruct the jury properly and completely concerning residual doubt (*id.* ¶ 2.j.); and (k) failing to instruct the jury properly concerning the unanimity requirement for a death sentence (*id.* ¶ 2.k.), and Petitioner's trial and appellate counsel failed to litigate those issues adequately (*id.* n.75); and (38) the trial court allowed evidence of prior convictions and the testimony of Anna Wallin at the sentencing phase of Petitioner's trial, and Petitioner's trial counsel failed to litigate those issues adequately (*id.* Claim 35 & n.76).

On June 15, 2004, Respondent filed his Answer-Response to Petitioner's § 2254 Petition, along with supporting exhibits. In his Answer-Response, Respondent argued that the following claims were unexhausted: (1) Petitioner's claim that his trial counsel provided ineffective assistance because trial counsel did not adequately litigate the issue of unadjudicated offenses (§ 2254 Petition Claim 13 n.40); (2) Petitioner's claim that his trial counsel provided ineffective assistance by not litigating the change of venue issue adequately (*id.* Claim 11, n.38 & 61); (3) Petitioner's claim that the trial court improperly commented on Petitioner's silence (*id.* Claim 12, n.39); (4) Petitioner's claim that the trial court erred by failing to admit polygraph evidence during the sentencing phase of Petitioner's trial (*id.* Claim 13); (5) Petitioner's claim that his trial counsel provided ineffective assistance of counsel because Petitioner's counsel inadequately litigated the issue of admissibility of polygraph evidence during the guilt and sentencing phases of Petitioner's trial (*id.* Claim 13, n.40); (6) Petitioner's claim that his trial counsel was ineffective because counsel did not litigate adequately the issue of similar transaction evidence (*id.* Claim 14, n.41); (7) Petitioner's contention that his trial counsel was ineffective because counsel did not litigate adequately the issue of Agent Hazelwood's testimony (*id.* Claim 15, n.42); (8) Petitioner's claim that his trial counsel provided ineffective assistance because counsel failed to litigate adequately the issue of the State's commenting on Petitioner's right to silence (*id.* Claim 16, n.44); (9) Petitioner's claim that his

trial counsel rendered ineffective assistance by failing to litigate adequately the issue of allegedly unconstitutionally seized evidence (*id.* Claim 18, n.47); (10) Petitioner's claim that his trial counsel was ineffective by failing to litigate adequately the admissibility of handwriting expert testimony (*id.*, Claim 19, n.48); (11) Petitioner's claim that his trial counsel provided ineffective assistance by failing to litigate adequately the admissibility of Petitioner's statement (*id.* Claim 20, n.50); (12) Petitioner's claim that his trial counsel was ineffective because counsel failed to litigate adequately the issue of Petitioner's innocence of the death penalty (*id.* Claim 21, n.51); (13) Petitioner's claim that his trial counsel was ineffective by failing to litigate adequately the issue of Petitioner not receiving a probable cause hearing (*id.* Claim 23, n.61); (14) Petitioner's claim that his trial counsel provided ineffective assistance by failing to litigate adequately the issue of Petitioner receiving a sentence for murder and feticide (*id.* Claim 24, n.63); (15) Petitioner's claim that his trial counsel was ineffective because counsel failed to litigate adequately the issue of the trial court's asking voir dire questions that conflicted with Petitioner's presumption of innocence (*id.* Claim 25, n.65); (16) Petitioner's claim that his trial counsel was ineffective by failing to litigate adequately the issue of how the indictment against Petitioner was obtained (*id.* Claim 26 (First), n. 66); (17) Petitioner's claim that his trial counsel provided ineffective assistance by failing to litigate adequately the trial court's use of the term "foreman" instead of "foreperson" (*id.* Claim 26 (Second), n.66);

(18) Petitioner's claim that his trial counsel was ineffective by failing to litigate adequately the selection procedures for the grand jury and jury (*id.* Claim 28 (Second), n.69); (19) Petitioner's claim that his trial counsel rendered ineffective assistance by failing to litigate adequately the constitutionality of Georgia's Unified Appeal Procedure (*id.* Claim 29, n.70); (20) Petitioner's claim that his trial counsel provided ineffective assistance because he failed to litigate adequately the issue of death qualification of the jury (*id.* Claim 30, n.71); (21) Petitioner's claim that his trial counsel was ineffective because he failed to litigate adequately the trial court's use of jury instructions that shifted the burden of proof to Petitioner (*id.* Claim 33, n.74); (22) Petitioner's claim that his trial counsel provided ineffective assistance by failing to litigate the trial court's jury charges adequately (*id.* Claim 34, n.34); and (23) Petitioner's claim that his trial counsel failed to litigate adequately the issue of Anna Wallin's testimony (*id.* Claim 35, n.76).

Respondent also argues that the state habeas court found that certain of Petitioner's claims are procedurally defaulted, including: (1) Petitioner's claim concerning juror/bailiff misconduct based on Petitioner's contention that a bailiff responded to questions from jurors (§ 2554 [sic] Petition, Claim 1); (2) Petitioner's claim that the trial court failed to excuse jurors who indicated that they expected Petitioner to prove his innocence (*id.* Claim 8); (3) Petitioner's claim that the trial court erred by failing to excuse Juror Kenneth

Craig for cause (*id.* claim 9); and (4) Petitioner's claim that the trial court erred by excusing certain jurors based on hardship (*id.* Claim 10).

On December 7, 2004, the Court entered a Consent Scheduling Order prepared by counsel. (Order of Dec. 7, 2004.) The December 7, 2004, Consent Scheduling Order directed counsel for Petitioner to file a brief concerning exhaustion and procedural default by January 10, 2005, and directed counsel for Respondent to file a response brief addressing those issues within fifteen days. (*Id.*) The parties filed their briefs as directed in the December 7, 2004, Order.

On March 15, 2005, the Court entered an Order permitting Petitioner to file a reply brief concerning procedural default and exhaustion within ten days. (Order of Mar. 15, 2005.) This matter now is ripe for resolution by the Court.

## II. Procedurally Defaulted Claims

The state habeas court found that four of Petitioner's claims were procedurally defaulted because Petitioner had not raised those claims on direct appeal. The Court first sets forth the general standards governing procedural default, and then applies those standards to Petitioner's allegedly procedurally-defaulted claims.

The law is well settled that "[a] state prisoner seeking federal habeas relief cannot raise a federal constitutional claim in federal court unless he first

properly raised the issue in the state courts." *Judd v. Haley,* 250 F.3d 1308, 1313 (11th Cir. 2001) (citing *Wainwright v. Sykes,* 433 U.S. 72, 87 (1977)). "The doctrine of procedural default was developed as a means of ensuring that federal habeas petitioners first seek relief in accordance with established state procedures." *Id.* (citing *Presnell v. Kemp,* 835 F.2d 1567, 1578-79 (11th Cir. 1988)). "A state court's rejection of a petitioner's constitutional claim on state procedural grounds will generally preclude any subsequent federal habeas review of that claim." *Id.* (citing *Harmon v. Barton,* 894 F.2d 1268, 1270 (11th Cir. 1990)). "However, a state court's rejection of a federal constitutional claim on procedural grounds will only preclude federal review if the state procedural ruling rests upon [an] 'independent and adequate' state ground." *Id.* (citing *Coleman v. Thompson,* 501 U.S. 722, 729-30 (1991) and *Harris v. Reed,* 489 U.S. 255, 262 (1989)).

To determine whether a claim is procedurally barred, the Court must apply a three-part test. *Judd,* 250 F.3d at 1312. First, the Court must determine whether the last state court to render a judgment in the case clearly and expressly stated that the court was relying on state procedural rules to resolve the federal claim, without reaching the merits of the claim. *Id.* Second, the Court must inquire whether the state court's decision rests solidly on state law grounds, and is not "'intertwined with an interpretation of federal law.'" *Id.* (quoting *Card v. Dugger,* 911 F.2d 1494, 1516 (11th Cir. 1990)). Third, the Court

must determine whether the state procedural rule is adequate. *Id.* To be "adequate" for purposes of procedural default, the procedural rule "must not be applied in an arbitrary or unprecedented fashion" and "cannot be 'manifestly unfair' in its treatment of the petitioner's federal constitutional claim." *Id.*

### A. Claim of Juror/Bailiff Misconduct and Improprieties

Respondent first argues that Petitioner's claim of bailiff misconduct in responding to juror questions and other bailiff/juror improprieties is procedurally barred. The state habeas court stated:

> Petitioner claims that the following improprieties occurred at trial: (a) a "high degree of familiarity and informal interaction" between the jury and bailiffs; (b) a failure to administer and comply with the bailiff oath; and (c) bailiff misconduct in responding to jurors' questions.
>
> > A procedural bar to asserting a claim on habeas corpus arises if the defendant failed to timely object to any alleged error or deficiency at trial or on appeal. The procedural bar, however, may be overcome if the petitioner shows, first, an adequate cause for failing to raise the issue earlier and, second, actual prejudice resulting from the alleged error or errors.

*Turpin v. Todd,* 268 Ga. 820, 824 (1997). "To show cause, [Petitioner] must demonstrate that 'some objective factor external to the defense impeded counsel's efforts to raise the claim that has been procedurally defaulted' [Cits.]"; "[i]neffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668 (104 S. Ct. 2052, 80 L.E.2d 674 (1984), also constitutes 'cause,' but attorney error that falls short of that standard does not." *Turpin v. Christenson,* 269 Ga. 226, 229 (1998). "To show prejudice, [Petitioner] must demonstrate actual prejudice that 'worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.' [Cits.]" *Id.* at 229-30.

Consideration of the alleged jury-bailiff communication improprieties is procedurally barred, as these arguments could have been raised on direct appeal. Petitioner has not met the cause requirement to overcome this bar for the claims set forth in (a) and (b) above. No external factor precluded defense counsel from raising these claims; defense counsel were not ineffective in failing to do so, as the claims clearly had no merit.

As for the alleged impropriety set forth in (c) above, Petitioner has failed to meet the prejudice requirement to overcome the procedural bar. While improper communication between bailiff and jury creates a presumption of prejudice on direct appeal, Petitioner has the burden of establishing actual prejudice in a habeas corpus action. *Turpin v.*

> *Todd, supra* at 830. Petitioner has not met this burden.
>
> "The only exception to the cause and prejudice test is the granting of habeas corpus relief to avoid a 'miscarriage of justice,' which is an extremely high standard." *Turpin v. Christenson, supra* at 229; *citing Valenzuela v. Newsome,* 253 Ga. 793 (4) (1985). Petitioner's allegations regarding jury-bailiff communications do not rise to this level.

(Respondent's Ex. 70 at 5-6.) On February 20, 2001, the Georgia Supreme Court directed:

> The habeas court shall clarify the portion of its order wherein it concluded that "defense counsel were not ineffective in failing" to raise a claim on direct appeal regarding the alleged failure of the trial court to administer the bailiff oath. Particularly, the habeas court shall clarify its conclusion that "the arguments clearly have no merit." The habeas court shall make any other related findings of fact or conclusions of law that it shall deem warranted. See *Hannah v. State,* 212 Ga. 313, 319-24 (6) (1956); see also *Turpin v. Todd,* 268 Ga. 820, 828-30 (2)(b) (1997).

(Respondent's Ex. 77 at 1-2.) On remand, the state habeas court found:

> In his Petition, Petitioner claims that the following improprieties occurred at trial: (a) a "high degree of familiarity and informal interaction" between the jury and bailiffs; (b)

a failure to administer and comply with the bailiff oath; and, (c) bailiff misconduct in responding to juror's [sic] questions. With respect to the Supreme Court's directive to clarify this Court's prior ruling that Petitioner's claims have no merit, this Court finds, in conjunction with its prior Order denying the Writ of Habeas Corpus, that Petitioner has not met the "cause" requirement to overcome the bar of procedural default as to (a)-(c) as Petitioner has failed to establish either: (1) an external factor precluding Petitioner from previously raising this claim, or (2) ineffective assistance of counsel given that Petitioner has not establish [sic] the "cause" to overcome the procedural default of this claim as he has failed to "affirmatively show" that the bailiff oath was not given, and as he has further failed to establish that the bailiffs engaged in any conduct that resulted in "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Turpin v. Todd*, 268 Ga. 820, 828 (1997). There is no affirmative evidence that the bailiff oath was not taken, no evidence that there was any question posed by the jury that was not answered by the trial court in open court, and no evidence to support Petitioner's allegation that a fifth question was asked about parole eligibility and not relayed to the trial judge. Accordingly, Petitioner's claim fails.

(Respondent's Ex. 82 at 2-3.)

The state habeas court's decision clearly and expressly stated that the state habeas court was relying on Georgia's procedural rule to resolve the claims relating to juror/bailiff misconduct and improprieties, and the state habeas court's decision rested on state law grounds. The state habeas court's decision thus satisfies the first two requirements for finding that the juror/bailiff misconduct and related improprieties claims are procedurally barred. *Judd*, 250 F.3d at 1312; *see also Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir. 1994) ("where a state court has ruled in the alternative, addressing both the independent state procedural ground and the merits of the federal claim, the federal court should apply the state procedural bar and decline to reach the merits of the claim").

Petitioner argues, however, that the state procedural rule was not adequate because, at the time of Petitioner's direct appeal, the Georgia courts did not require that a habeas petitioner raise all of his claims on direct appeal in order to avoid procedurally defaulting the claims for habeas review. O.C.G.A. § 9-14-48(d) provides that for purposes of habeas review:

> The court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal and whether, in the event the petitioner had new counsel subsequent to a trial, the petitioner raised any claim of ineffective

> assistance of trial counsel on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief shall not be granted. In all cases habeas corpus relief shall be granted to avoid a miscarriage of justice. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary or proper.

O.C.G.A. § 9-14-48(d). Prior to the time of Petitioner's direct appeal, the Georgia courts had found that a failure to raise a claim on direct appeal barred consideration of the claim in connection with a petition for a writ of habeas corpus, absent a showing of cause and prejudice or a miscarriage of justice. *Newsome v. Black*, 258 Ga. 787, 788 (1989) (quoting *Valenzuela v. Newsome*, 253 Ga. 793, 796 (1985)); *Davis v. Williams*, 258 Ga. 552, 552-53 (1988). Indeed, by 1985, the Georgia Supreme Court had expressly stated:

> The rule now may be stated as follows: a failure to make timely objection to *any* alleged error or deficiency or to pursue the same on appeal ordinarily will preclude review by writ of habeas corpus. However, an otherwise valid procedural bar will not preclude a habeas corpus court from considering alleged constitutional errors or deficiencies if there shall be a showing of adequate cause for failure to object or to pursue on appeal and a showing of actual prejudice to the

> accused. Even absent such a showing of cause and prejudice, the relief of the writ will remain available to avoid a miscarriage of justice where there has been a substantial denial of constitutional rights.

*Black v. Hardin*, 255 Ga. 239, 240 (1985). Thus, by the time of Petitioner's direct appeal, it was clear that under Georgia law, a petitioner had to raise a claim of error on direct appeal to avoid procedurally defaulting it for purposes of habeas review. Petitioner's argument consequently fails, and his claims of juror/bailiff misconduct and related improprieties are procedurally defaulted.

Petitioner, however, can escape the procedural default bar by demonstrating cause for the default and prejudice, or by establishing a fundamental miscarriage of justice. *Isaacs v. Head*, 300 F.3d 1232, 1254 (11th Cir. 2002), *cert. denied*, 538 U.S. 988 (2003). To show cause, Petitioner must show that some objective factor external to the defense prevented him from raising the claim. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Petitioner can make this showing by demonstrating that "the factual or legal basis for a claim was not reasonably available to counsel or that 'some interference by officials made compliance impracticable.'" *Id.* (citations omitted). Petitioner also can show cause by demonstrating that his counsel provided ineffective assistance such as to give rise to an independent constitutional claim. *Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000). The state

habeas court concluded that Petitioner had failed to make that showing, and the Court agrees.

A petitioner also must show prejudice to overcome a procedural bar. *Zeigler v. Crosby*, 345 F.3d 1300, 1305 (11th Cir. 2003), *cert. denied*, 125 S. Ct. 280 (2004). To satisfy the prejudice requirement, a petitioner must demonstrate that "'the errors at trial actually and substantially disadvantaged his defense so that he was denied fundamental fairness.'" *Id.* (quoting *McCoy v. Newsome*, 953 F.2d 1252, 1261 (11th Cir. 1992)). A petitioner must show "'that there is a reasonable probability that the jury would have returned a different verdict'" in the absence of the error. *Id.* (quoting *Mincey v. Head*, 206 F.3d 1106, 1135-36 (11th Cir. 2000)) (internal quotation marks omitted). The state habeas court found that Petitioner could not make that showing, and the Court agrees.

Alternatively, Petitioner can overcome the procedural bar by "'establishing a fundamental miscarriage of justice.'" *Isaacs*, 300 F.3d at 1254 (quoting *Bailey v. Nagle*, 172 F.3d 1299, 1306 (11th Cir. 1999)). A fundamental miscarriage of justice will occur "where a constitutional violation has 'probably resulted' in the conviction of one who is 'actually innocent' of the substantive offense.'" *Dretke v. Haley*, 541 U.S. 386, 124 S. Ct. 1847, 1852 (2004) (quoting *Murray*, 477 U.S. at 496). Petitioner has not met his burden to show that this exception applies. Consequently, Petitioner's claim of juror/bailiff misconduct and other related improprieties is procedurally barred.

### B. Claims Concerning Failure to Excuse Jurors

Respondent claims that three more of Petitioner's claims are procedurally barred: (1) Petitioner's claim that the trial court failed to excuse jurors who indicated that they expected Petitioner to prove his innocence (§ 2254 Petition, Claim 8); (2) Petitioner's claim that the trial court erred by failing to excuse Juror Kenneth Craig for cause (*id.* claim 9); and (3) Petitioner's claim that the trial court erred by excusing certain jurors based on hardship (*id.* Claim 10). In its decision, the state habeas court stated:

> ***(9) Other Voir Dire Issues***
>
> Petitioner claims that the trial court failed to remove for cause certain jurors and prospective jurors who either had fixed opinions about his guilt, indicated that they would expect him to prove that he was innocent, or indicated that they would be influenced by knowledge of other criminal accusations against him. These claims are procedurally barred because they were not raised on direct appeal.
>
> To the extent Petitioner argues that the trial court's decisions were the result of defense counsels' ineffective voir dire or failure to object, the Court finds, after a review of the record, that defense counsels' performance in this regard was not deficient. As there was no deficiency at trial, any failure to argue the issue on direct appeal could not form the basis for an ineffective assistance of

counsel claim. Accordingly, Petitioner has not met the cause requirement to overcome the procedural bar to these claims.

### *(10) Juror Kenneth Craig*

Juror Craig realized during the course of the trial that he was acquainted with Anna Wallin, one of the State's witnesses, and had discussed with her certain events that might be relevant to the case. He advised the trial court, (Tr. 3292), and was questioned to ascertain the impact of these facts on his ability to be fair and impartial, (Tr. 3299-3308). Defense counsel ultimately chose to leave Craig on the jury, (Tr. 4836), because "there was something about him that [attorney Townley] liked," (Hab. 368). Petitioner argues that the trial court was required to remove Craig for cause and that defense counsels' decision to retain him constituted ineffective assistance.

As for Petitioner's ineffective assistance argument, the Court finds that defense counsels' strategic decision to retain this juror was an exercise of reasonable professional judgment that did not alter the result of the proceeding. Because there was no deficiency at trial, any failure to argue the issue on direct appeal could not form the basis for an ineffective assistance of counsel claim.

Petitioner's argument regarding the trial court's failure to remove this juror for cause is procedurally barred because it was not raised on direct appeal. No external

factor precluded defense counsel from raising the claim and, as discussed above, defense counsel were not ineffective in failing to do so. Thus, Petitioner has not met the cause requirement to overcome the procedural bar.

***(11) Jurors Excused for Hardship***

Petitioner claims that the trial court excused a disproportionate number of apparently "pro-defense" prospective jurors for hardship reasons. This argument is procedurally barred, as it was not raised on direct appeal.

To the extent Petitioner argues that the trial court's decisions were the result of defense counsels' ineffective juror questioning, the Court finds, after a review of the record, that defense counsels' performance in this regard was not deficient. As there was no deficiency at trial, any failure to argue the issue on direct appeal could not form the basis for an ineffective assistance of counsel claim. Accordingly, Petitioner has not met the cause requirement to overcome the procedural bar to this claim.

(Respondent's Ex. 70 at 16-18.) The state habeas court consequently found that all three of those claims were procedurally barred. (*Id.*)

Petitioner, however, argues that he raised those claims on direct appeal. In his enumerations of error, Petitioner asserted that the following errors related to jury selection had occurred: (1) the trial court erred

in excluding from the jury pool those members of the population who do not favor the death penalty (Respondent's Ex. 42 (Enumeration No. 35)); (2) the trial court erroneously excluded certain jurors for alleged conscientious objection to the death penalty (*id.* (Enumeration No. 36)); (3) the trial court erroneously refused to strike certain jurors who demonstrated bias, predisposition, and who indicated they would not give realistic consideration to a sentence of life imprisonment (*id.* (Enumeration No. 37)); and (4) the trial court erred in not granting defendant's motion to strike a second jury for the purpose of sentencing (*id.* (Enumeration No. 38)). Petitioner, however, did not expressly assert his claims that the trial court failed to excuse jurors who indicated that they expected Petitioner to prove his innocence, that the trial court erred by failing to excuse Juror Kenneth Craig for cause, or that the trial court erred by excusing certain jurors based on hardship on direct appeal. This argument consequently fails.

Alternatively, Petitioner argues that the Georgia Supreme Court nonetheless passed on his claims that the trial court failed to excuse jurors who indicated that they expected Petitioner to prove his innocence, that the trial court erred by failing to excuse Juror Kenneth Craig for cause, or that the trial court erred by excusing certain jurors based on hardship on direct appeal, even though Petitioner did not expressly raise those claims on direct appeal. To evaluate this argument, the Court first looks to the Georgia

Supreme Court's decision relating to Petitioner's direct appeal.

In its decision addressing Petitioner's direct appeal, the Georgia Supreme Court stated:

> 22. Death-qualification of prospective jurors is not improper. *Moon v. State,* 258 Ga. 748, 761 (40) (375 SE2d 442) (1988). The trial court's rulings on the qualifications of the prospective jurors were "within the deference due the trial judge's determination." *Jefferson v. State,* 256 Ga. 821, 824 (2) (353 SE2d 468) (1987).
>
> 23. The defendant is not entitled to separate juries for the guilt and sentencing phases of the trial. *Miller v. State,* 237 Ga. 557, 559 (229 SE2d 376) (1976).

(Respondent's Ex. 45 at 13.) Petitioner claims that the Georgia Supreme Court was obligated to review the entire record on appeal, and that the Georgia Supreme Court consequently must have considered the jury-related claims that Petitioner now seeks to raise.

It is "a well established principle that a state appellate court's routine plain error review of a conviction or sentence *does not,* standing alone, excuse a procedural default." *Peoples v. Campbell,* 377 F.3d 1208, 1235 n.55 (11th Cir. 2004). There is no indication in the record that the Georgia Supreme Court, when conducting its plain error review, identified any of the claims that Petitioner now seeks to raise and

decided those claims on the merits. *Id.* Additionally, as discussed above, there is no indication in the record that Petitioner called the Georgia Supreme Court's attention to his claims that the trial court failed to excuse jurors who indicated that they expected Petitioner to prove his innocence, that the trial court erred by failing to excuse Juror Kenneth Craig for cause, or that the trial court erred by excusing certain jurors based on hardship. The Court consequently cannot determine that Petitioner fairly presented his claims that the trial court failed to excuse jurors who indicated that they expected Petitioner to prove his innocence, that the trial court erred by failing to excuse Juror Kenneth Craig for cause, or that the trial court erred by excusing certain jurors based on hardship to the Georgia Supreme Court on direct appeal. *See Isaacs,* 300 F.3d at 1254 (finding petitioner did not fairly present federal constitutional claim related to prayer to Georgia Supreme Court where petitioner cited no federal cases and used no language that would have alerted Georgia Supreme Court to fact that petitioner was asserting federal constitutional claim that was separate and independent from prayer claim).

As discussed above, the Court finds that Petitioner failed to present his claims that the trial court failed to excuse jurors who indicated that they expected Petitioner to prove his innocence, that the trial court erred by failing to excuse Juror Kenneth Craig for cause, or that the trial court erred by excusing

certain jurors based on hardship fairly to the Georgia Supreme Court on direct appeal.

Further, as discussed *supra* Part II.A., Petitioner was required to raise those claims on direct appeal to avoid procedurally defaulting the claims. The state habeas court's decision clearly and expressly stated that the state habeas court was relying on Georgia's procedural rule to resolve Petitioner's claims that the trial court failed to excuse jurors who indicated that they expected Petitioner to prove his innocence, that the trial court erred by failing to excuse Juror Kenneth Craig for cause, and that the trial court erred by excusing certain jurors based on hardship, and the state habeas court's decision rested on state law grounds. Petitioner thus has procedurally defaulted those claims.

Petitioner can escape the procedural default bar by demonstrating cause for the default and prejudice, or by establishing a fundamental miscarriage of justice. *Isaacs,* 300 F.3d at 1254. The state habeas court concluded that Petitioner had failed to make a showing of cause, and the Court agrees. Further, the Court concludes that Petitioner has failed to make a showing of prejudice or a showing that a fundamental miscarriage of justice has occurred. Consequently, Petitioner's claims that the trial court failed to excuse jurors who indicated that they expected Petitioner to prove his innocence (§ 2254 Petition Claim 8), that the trial court erred by failing to excuse Juror Kenneth Craig for cause (*id.* Claim 9), and that the trial court erred by excusing certain

jurors based on hardship are procedurally barred (*id.* Claim 10), and Petitioner may not obtain § 2254 relief based on those claims.

**II** [sic]. **Unexhausted Claims**

Respondent also argues that Petitioner has failed to exhaust the following claims: (1) Petitioner's claim that his trial and appellate counsel provided ineffective assistance because trial counsel did not adequately litigate the issue of unadjudicated offenses (§ 2254 Petition Claim 14 n.40); (2) Petitioner's claim that his trial and appellate counsel provided ineffective assistance by not litigating the change of venue issue adequately (*id.* Claim 11, n.38 & 61); (3) Petitioner's claim that his trial and appellate counsel provided ineffective assistance by not litigating adequately the issue of the trial court's improperly commenting on Petitioner's silence (*id.* Claim 12, n.39); (4) Petitioner's claim that the trial court erred by failing to admit polygraph evidence during the sentencing phase of Petitioner's trial (*id.* Claim 13);[1] (5) Petitioner's trial and appellate counsel provided ineffective assistance of counsel because Petitioner's

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[1] Petitioner has not responded to Respondent's allegations that the portion of Claim 13 relating to Petitioner's allegations that the trial court erred by refusing to admit polygraph evidence during the sentencing phase of Petitioner's trial is unexhausted. The Court finds that Petitioner has failed to present that claim to the state courts, and that the claim consequently is unexhausted.

counsel inadequately litigated the issue of admissibility of polygraph evidence during the guilt and sentencing phases of Petitioner's trial (*id.* Claim 13, n.40); (6) Petitioner's trial and appellate counsel were ineffective because counsel did not litigate adequately the issue of similar transaction evidence (*id.* Claim 14, n.41); (7) Petitioner's trial and appellate counsel were ineffective because counsel did not litigate adequately the issue of Agent Hazelwood's testimony (*id.* Claim 15, n.42); (8) Petitioner's trial and appellate counsel provided ineffective assistance because counsel failed to litigate adequately the issue of the State's commenting on Petitioner's right to silence (*id.* Claim 16, n.44); (9) Petitioner's trial and appellate counsel rendered ineffective assistance by failing to litigate adequately the issue of allegedly unconstitutionally seized evidence (*id.* Claim 18, n.47); (10) Petitioner's trial and appellate counsel were ineffective by failing to litigate adequately the admissibility of handwriting expert testimony (*id.* Claim 19, n.48); (11) Petitioner's trial and appellate counsel provided ineffective assistance by failing to litigate adequately the admissibility of Petitioner's statement (*id.* Claim 20, n.50); (12) Petitioner's trial and appellate counsel were ineffective because counsel failed to litigate adequately the issue of Petitioner's innocence of the death penalty (*id.* Claim 21, n.51); (13) Petitioner's trial and appellate counsel were ineffective by failing to litigate adequately the issue of Petitioner not receiving a probable cause hearing (*id.* Claim 23, n.61); (14) Petitioner's trial and appellate counsel

provided ineffective assistance by failing to litigate adequately the issue of Petitioner receiving a sentence for murder and feticide (*id.* Claim 24, n.63); (15) Petitioner's trial and appellate counsel were ineffective because they failed to litigate adequately the issue of the trial court's asking voir dire questions that conflicted with Petitioner's presumption of innocence (*id.* Claim 25, n.65); (16) Petitioner's trial and appellate counsel were ineffective by failing to litigate adequately the issue of how the indictment against Petitioner was obtained (*id.* Claim 26 (First), n.66); (17) Petitioner's trial and appellate counsel provided ineffective assistance by failing to litigate adequately the trial court's use of the term "foreman" instead of "foreperson" (*id.* Claim 26 (Second), n.66); (18) Petitioner's trial and appellate counsel were ineffective by failing to litigate adequately the selection procedures for the grand jury and jury (*id.* Claim 28 (Second), n.69); (19) Petitioner's trial and appellate counsel rendered ineffective assistance by failing to litigate adequately the constitutionality of Georgia's Unified Appeal Procedure (*id.* Claim 29, n.70); (20) Petitioner's trial and appellate counsel provided ineffective assistance because they failed to litigate adequately the issue of death qualification of the jury (*id.* Claim 30, n.71); (21) Petitioner's trial and appellate counsel were ineffective because they failed to litigate adequately the trial court's use of jury instructions that shifted the burden of proof to Petitioner (*id.* Claim 33, n.74); (22) Petitioner's trial and appellate counsel provided ineffective assistance by failing to litigate the trial court's jury charges adequately (*id.* Claim

34, n.34); and (23) Petitioner's trial and appellate counsel failed to litigate adequately the issue of Anna Wallin's testimony (*id.* Claim 35, n.76).[2] Petitioner argues that he previously raised those claims, that the state habeas court considered those claims, or that he raised those claims in his application for a certificate of probable cause.

A habeas petitioner "generally cannot raise claims in federal court that were not first exhausted in state court." *Kelly v. Sec'y for Dep't of Corr.*, 377 F.3d 1317, 1343 (11th Cir. 2004) (citing *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998)). "To properly exhaust a claim, 'the petitioner must afford the State a full and fair opportunity to address and resolve the claim on the merits.'" *Id.* (citing *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992)). "It is not sufficient merely that the federal habeas petitioner has been through the state courts, nor is it sufficient that all the facts necessary to support the claim were before the state courts or that a somewhat similar state-law claim was made." *Id.* at 1343-44 (citations omitted). Instead, "[t]he petitioner must present his claims to the state courts such that they are permitted the 'opportunity to apply controlling legal

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[2] Petitioner argued in his state habeas petition that his counsel were ineffective for failing to investigate Petitioner's unadjudicated offenses and prior convictions. Petitioner now argues that his trial and appellate counsel were ineffective for failing to litigate Petitioner's unadjudicated offenses and prior convictions adequately. The Court finds that the two claims are distinct and rely on different facts.

principles to the facts bearing upon [the petitioner's] constitutional claim.'" *Id.* at 1344 (quoting *Picard v. Connor,* 404 U.S. 270, 275-76 (1971)).

"[T]he prohibition against raising nonexhausted claims in federal court extends not only to broad legal theories of relief, but also to the specific assertions of fact that might support relief." *Kelley,* 377 F.3d at 1344. Consequently, a habeas petitioner cannot present a particular claim of ineffective assistance of counsel in his federal habeas petition if he did not first present that claim to the state courts for review. *Id.* The United States Court of Appeals for the Eleventh Circuit has stated:

> allowing a habeas petitioner to allege a single instance of ineffective assistance in his state post-conviction proceedings and then proceed to federal court to allege additional instances would be contrary to the state's "full and fair opportunity to address the claim on the merits." The state would never have the benefit of evaluating the claim using a fully developed set of facts. This would not be the "serious and meaningful" exhaustion of claims that Congress intended.

*Footman v. Singletary,* 978 F.2d 1207, 1211 (11th Cir. 1992). A habeas petitioner thus cannot preserve an otherwise unexhausted, specific claim of ineffective assistance of counsel simply by arguing that his counsel was ineffective in a general, unspecified way. *Kelley,* 377 F.3d at 1344. Thus, "to preserve a claim of ineffective assistance of counsel for federal review,

the habeas petitioner must assert this theory of relief and transparently present the state courts with the specific acts or omissions of his lawyers that resulted in prejudice." *Id.*

Petitioner first argues that he asserted the above-listed ineffective assistance of counsel claims before the state habeas court because Petitioner's state petition for a writ of habeas corpus stated expressly that "[t]rial counsel's ineffectiveness includes, but is not limited to, the following:" and then included a list of claims of ineffective assistance of counsel. (Resp't's Ex. 54 at 5.) In his First Amended Petition for Writ of Habeas Corpus, Petitioner expressly asserted the following ineffective assistance of counsel claims: (1) trial counsel unreasonably failed to move to strike for cause certain jurors who had obvious, fixed opinions that if Petitioner were convicted of murder, he should be automatically sentenced to death; (2) trial counsel unreasonably failed to ask the trial court to remove for cause jurors who indicated that they would expect Petitioner to prove that he was innocent rather than the State proving that Petitioner was guilty; (3) trial counsel unreasonably failed to ask the trial court to remove for cause jurors who indicated that Petitioner would have to convince them why he should live instead of the State proving that he should be sentenced to death; (4) trial counsel unreasonably failed to ask the trial court to remove for cause jurors who indicated that knowing that Petitioner was accused of other crimes might influence their decision in this case; (5) trial counsel

unreasonably failed to ask the trial court to remove juror Kenneth Craig for cause; (6) trial counsel unreasonably failed to move to strike for cause juror Joy Cheatwood, who testified during voir dire that she was not a resident of Walker County; (7) trial counsel unreasonably failed to move to strike juror Laura Berry for cause, who stated that she had "read up" on what "God tells about murder and stuff like that" the night before voir dire; (8) trial counsel unreasonably failed to move to strike for cause juror Gaynelle Brock after becoming aware of allegations that she had expressed strong opinions about Petitioner's guilt; (9) trial counsel failed to introduce evidence of Petitioner's traumatic childhood; (10) trial counsel compounded the prejudice caused by their failure to introduce evidence of Petitioner's traumatic childhood by asking jurors questions that would lead them to believe that such evidence would be presented and then failing to present the evidence; (11) trial counsel compounded the prejudice caused by their failure to introduce evidence of Petitioner's traumatic childhood by suggesting to the jury during closing argument that any such evidence was not important and would not be reason to vote for a sentence of less than death; (12) trial counsel was ineffective for failing to investigate, develop, and present independent evidence of Petitioner's mental illness during the sentencing phase of Petitioner's capital trial; (13) trial counsel was ineffective for failing to conduct an independent psychological evaluation of Petitioner; (14) trial counsel failed to conduct an independent psychological evaluation to support Petitioner's

motion asking the trial court to find that a guilty but mentally ill verdict precluded a death sentence; (15) trial counsel failed to conduct an independent psychological evaluation to support Petitioner's request for a jury instruction concerning consideration of Petitioner's mental capacity or emotional disturbance; (16) trial counsel failed to pursue a guilty but mentally ill defense at Petitioner's trial; (17) trial counsel were ineffective for failing to request funds for an expert in the area of sexual disorders to rebut the testimony of FBI expert Robert Hazelwood at the guilt/innocence portion of Petitioner's trial; (18) trial counsel were ineffective for using State witness Robert Hazelwood as a defense witness during the sentencing portion of Petitioner's trial, rather than acquiring an independent expert; (19) trial counsel elicited testimony from Roy Hazelwood that Petitioner was a "power reassurance rapist"; (20) trial counsel failed to obtain expert assistance to rebut certain other contentions by the State; (21) trial counsel told potential jurors that Petitioner was not insane; (22) trial counsel failed to investigate properly the unadjudicated criminal offenses of which Petitioner was accused; (23) trial counsel failed to investigate properly the underlying facts of Petitioner's prior convictions; (24) trial counsel failed to challenge properly Petitioner's Floyd County, Georgia, guilty plea to rape, kidnaping, aggravated sodomy, and burglary charges relating to Donna Rich; (25) trial counsel opened the door to gruesome photographs of the victim; (26) trial counsel failed to object to the trial court's misstatement to the jury that there "might be" another part of the trial if

the jury found Petitioner guilty; (27) trial counsel failed to object to the trial court's erroneous unanimity instruction; (28) trial counsel failed to conduct an adequate pretrial investigation into the State's case and Petitioner's available defenses; (29) trial counsel failed to conduct an adequate pretrial investigation to ascertain potential mitigation witnesses and failed to offer mitigation witnesses at sentencing; (30) trial counsel failed to provide relevant and important information to State mental health experts who evaluated Petitioner; (31) trial counsel failed to cross-examine State witnesses aggressively and adequately; (32) trial counsel failed to conduct adequate direct examination and cross-examination of witnesses; (33) trial counsel failed to challenge false and misleading testimony of State witnesses; (34) trial counsel failed to make specific objections to certain portions of improper, prejudicial, and unconstitutional arguments by the State at both portions of Petitioner's trial; (35) trial counsel failed to counsel Petitioner properly concerning the option of entering a guilty plea in exchange for a life sentence; and (36) trial counsel lacked knowledge of and familiarity with both procedural and substantive federal and state law relating to the trial of a death penalty case, and counsel failed to apply such law effectively to the facts of Petitioner's case through competent pretrial preparation and investigation. (*Id.* at 5-13.)

In his post-hearing brief in support of his state habeas petition, Petitioner also stated: "Trial counsel's ineffectiveness includes, but is not limited to, the

following." (Resp't's Ex. 67 at 38.) Petitioner then expressly alleged the following ineffective assistance of counsel claims: (1) trial counsel opened the door to gory photographs of the victim (*id.*); (2) trial counsel failed to obtain DNA testing of the blood on the quilt that allegedly belonged to the victim (*id.* at 41); (3) trial counsel unreasonably failed to investigate and to present evidence of Petitioner's traumatic childhood and of Petitioner's positive character traits, and compounded the prejudice resulting from those omissions by asking questions of jurors during voir dire that would lead the jurors to believe that such evidence would be produced, and by indicating during counsel's penalty-phase opening statement that such evidence would be produced (*id.* at 42); (4) trial counsel failed to obtain competent, independent mental health expert assistance to prepare for trial and to present evidence (*id.* at 60); and (5) trial counsel failed to secure the services of an expert in offender profiling to rebut the testimony of State witness Robert Hazelwood (*id.* at 96). Petitioner then stated: "Other instances of trial counsel's ineffectiveness include, but are not limited to the following." (*Id.* at 108.) Petitioner expressly listed the following ineffective assistance of counsel claims in his post-hearing brief in support of his state habeas corpus petition: (1) trial counsel unreasonably failed to move to strike for cause certain jurors who had obvious, fixed opinions that if Petitioner were convicted of murder, he automatically should receive a death sentence (*id.*); (2) trial counsel unreasonably failed to ask the trial court to remove for cause jurors who

indicated that Petitioner would have to convince them why he should live, instead of the State proving that Petitioner should receive a sentence of death (*id.*); (3) trial counsel failed to ask the trial court to remove for cause jurors who indicated that knowing that Petitioner was accused of other crimes might influence their decision in this case (*id.*); (4) trial counsel failed to remove for cause juror Kenneth Craig, who was acquainted with State witness Anna Wallin and who had spoken with her about the incident that formed the basis of Ms. Wallin's testimony (*id.* at 108-09); (5) trial counsel failed to move to strike juror Joy Cheatwood, who did not reside in Walker County (*id.* at 109); (6) trial counsel unreasonably failed to move to strike juror Laura Berry for cause, who stated that she had "read up" on what "God tells about murder and stuff like that" the night before voir dire (*id.*); (8) trial counsel unreasonably failed to move to strike for cause juror Gaynelle Brock after becoming aware of allegations that she had expressed strong opinions about Petitioner's guilt (*id.* at 109-110); (9) trial counsel failed to obtain expert assistance to rebut certain other contentions by the State (*id.* at 110); (10) trial counsel told potential jurors during voir dire that Petitioner was not insane (*id.*); (11) trial counsel failed to conduct an adequate pretrial investigation into the State's case and the defenses available to Petitioner, including obtaining DNA testing of blood found in the initial suspect's truck and of blood on a quilt allegedly belonging to the victim (*id.* at 110-11); (12) trial counsel failed to investigate properly the unadjudicated criminal

offenses of which Petitioner was accused (*id.* at 111); (13) trial counsel failed to investigate properly the facts of Petitioner's prior convictions (*id.*); (14) trial counsel failed to challenge properly Petitioner's Floyd County, Georgia, guilty plea to rape, kidnaping, aggravated sodomy, and burglary charges relating to Donna Rich (*id.*); (15) trial counsel failed to object to the trial court's misstatement to the jury that there "might be" another part of the trial if the jury found Petitioner guilty (*id.*); (16) trial counsel failed to object to the trial court's erroneous unanimity instruction (*id.* at 112); (17) trial counsel failed to conduct their own mental health evaluation of Petitioner to support their pretrial motion asking the trial court to find that a guilty but mentally ill verdict precluded a death sentence (*id.*); (18) trial counsel's failure to pursue an independent mental health examination resulted in an inability to support their request that the trial court instruct the jury to consider Petitioner's mental capacity or emotional disturbance (*id.*); (19) trial counsel failed to pursue a guilty but mentally ill defense at Petitioner's trial (*id.*); (20) trial counsel failed to cross-examine State witnesses aggressively and adequately (*id.* at 112-13); (21) trial counsel failed to challenge false and misleading testimony of State witnesses (*id.* at 113); (22) trial counsel failed to make specific objections to certain portions of improper, prejudicial, and unconstitutional arguments by the State at both portions of Petitioner's trial (*id.* at 113); (23) trial counsel failed to counsel Petitioner properly concerning the option of entering a guilty plea in exchange for a life

sentence (*id.*); and (24) trial counsel lacked knowledge of and familiarity with both procedural and substantive federal and state law relating to the trial of a death penalty case, and counsel failed to apply such law effectively to the facts of Petitioner's case through competent pretrial preparation and investigation (*id.*).

Petitioner's statement that his trial counsel's ineffectiveness "includes, but is not limited to the following" was not sufficient to give the state habeas court notice of the claims that Petitioner now attempts to assert. Indeed, Petitioner's First Amended Petition for Writ of Habeas Corpus and his post-hearing brief do not even hint that Petitioner was attempting to assert his new claims of ineffective assistance of counsel before the state habeas court. Even if, as Petitioner argues, all the facts necessary to support his new ineffective assistance of counsel claims were before the state habeas court, Petitioner still did not provide the state habeas court with the particular legal arguments for relief relating to his new claims.[3] Consequently, Petitioner has not

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[3] The Court acknowledges that Petitioner alleged in his state habeas petition that his counsel failed to *investigate* facts relating to his unadjudicated offenses. In his § 2254 Petition, however, Petitioner contends that his trial and appellate counsel failed to *litigate* those unadjudicated offenses effectively. The Court finds that the claims of failure to investigate and failure to litigate are distinct claims that rely upon different facts. Consequently, Petitioner did not exhaust his ineffective assistance of counsel claim related to counsel's failure to litigate his

(Continued on following page)

exhausted those claims. *Kelley,* 177 F.3d at 1350 ("'It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made. To exhaust the claim sufficiently, [Petitioner] must have presented the state court with this particular legal basis for relief in addition to the facts supporting it.'") (quoting *Anderson v. Harless,* 459 U.S. 4, 6 (1982)) (citations omitted).

Petitioner also argues that the state habeas court's decision indicates that the state habeas court necessarily considered all of Petitioner's ineffective assistance of counsel claims, including the claims that Petitioner now seeks to raise. The state habeas court expressly addressed Petitioner's ineffective assistance claims relating to: (1) opening the door to photographs of the victim (Respondent's Ex. 70 at 8); (2) the failure to conduct DNA testing (*id.* at 8-9); (3) the failure to conduct an investigation into Petitioner's background to obtain mitigating evidence (*id.* at 9-10); (4) the failure to obtain the assistance of an independent mental health expert (*id.* at 10-11); and (5) the failure to obtain the assistance of a criminal profiling expert (*id.* at 11-12). The state habeas court then stated: "As for Petitioner's claims regarding 'other instances' of ineffectiveness, these arguments are either addressed elsewhere in this Order, or have

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unadjudicated offenses effectively by alleging in his state habeas petition and related documents that counsel failed to investigate those offenses.

been found by the Court, after a review of the record, to have no merit." (*Id.* at 12.) The Court cannot presume from this statement that the state habeas court necessarily pored over the record of the case and addressed not only the ineffective assistance of counsel claims that Petitioner expressly raised in his state habeas petition and related documents but also claims that Petitioner did not expressly address but might choose to raise in the future. Indeed, there is no indication that the state court was attempting to rule on the merits of any ineffective assistance claims other than those actually presented to it by Petitioner. Petitioner thus has failed to exhaust his newly-asserted ineffective assistance of counsel claims. *Isaacs,* 300 F.3d at 1257 n.14 (noting ineffective assistance of counsel claim was not exhausted where petitioner had not raised claim in his state habeas petition, state habeas court did not rule on the merits of any ineffective assistance of counsel claims other than those presented to it, and there was no indication that state habeas court reviewed entire record searching for other instances of ineffective assistance of counsel).

Alternatively, Petitioner argues that he raised many of the allegedly unexhausted ineffective assistance of counsel claims in his applications for certificates of probable cause to the Georgia Supreme Court, and that the Georgia Supreme Court

consequently must have considered those claims.[4] Under O.C.G.A. § 9-14-52(b), an application for a

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[4] O.C.G.A. § 9-14-52 provides, in relevant part:

(a) Appeals in habeas corpus cases brought under this article shall be governed by Chapter 6 of Title 5 except that as to final orders of the court which are adverse to the petitioner no appeal shall be allowed unless the Supreme Court of this state issues a certificate of probable cause for the appeal.

(b) If an unsuccessful petitioner desires to appeal, he must file a written application for a certificate of probable cause to appeal with the clerk of the Supreme Court within 30 days from the entry of the order denying him relief. The petitioner shall also file within the same period a notice of appeal with the clerk of the concerned superior court. The Supreme Court shall either grant or deny the application within a reasonable time after filing. In order for the Supreme Court to consider fully the request for a certificate, the clerk of the concerned superior court shall forward, as in any other case, the record and transcript, if designated, to the clerk of the Supreme Court when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file a copy of the original record and a copy of the original transcript of proceedings. The clerk of the Supreme Court shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Supreme Court denies the application for a certificate of probable cause, the clerk of the Supreme Court shall return the original record and transcript and shall notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

O.C.G.A. § 9-12-52.

certificate of probable cause is a discretionary appeal to the Georgia Supreme Court – meaning that the Georgia Supreme Court may grant or deny the application to appeal. Although the Georgia courts do not appear to have addressed this issue specifically, other courts have found that a petitioner does not fairly present a claim to the state courts for exhaustion purposes by presenting the claim for the first time in an application for a discretionary appeal or in an application for a certificate of probable cause to appeal. *Castille v. Peoples*, 489 U.S. 346, 350-51 (1989) (finding petitioner did not exhaust claim by presenting it for first time in discretionary appeal); *see also Fleming v. Merrill*, No. 01-239-B, 2002 WL 1334826, at *4 (D. Me. June 18, 2002) ("Raising a claim for the first time in a request for a certificate of probable cause to appeal from the denial of post-conviction relief is a procedural default under Maine law."). The Court finds this reasoning persuasive, and concludes that Petitioner did not fairly present his allegedly unexhausted ineffective assistance of counsel claims to the state courts by asserting those claims for the first time in his applications for certificates of probable cause to appeal.

Petitioner requests that the Court stay this action to permit Petitioner to exhaust his unexhausted claims. Because Petitioner's § 2254 Petition contains both exhausted and unexhausted claims, the Petition is a mixed petition. *Kelley*, 377 F.3d at 1351. The Court ordinarily must dismiss mixed petitions to allow a petitioner the choice of returning to state

court to exhaust his claims or to amend or resubmit his habeas petition to present only exhausted claims to the Court. *Id.* "Dismissing a mixed petition is of little utility, however, when the claims raised for the first time at the federal level can no longer be litigated on the merits in state court because they are procedurally barred." *Id.* "In such a case, requiring the petitioner to return to state court only to make a futile application for relief simply delays the federal courts' adjudication of his petition." *Id.* Under those circumstances, the Court can forego dismissing the petition based on the unexhausted claims and treat the unexhausted claims as procedurally defaulted. *Id.* (quoting *Snowden,* 135 F.3d at 736).

Here, the Georgia courts would not permit Petitioner to assert his unexhausted ineffective assistance of counsel claims in a second or successive habeas petition. O.C.G.A. § 9-14-51; *see also Herrington v. State,* 265 Ga. App. 454, 459 n.23 ("A second habeas petition is subject to dismissal as successive."). Dismissing Petitioner's unexhausted claims or staying the § 2254 Petition to allow Petitioner to attempt to exhaust those claims thus would be futile. The Court therefore will treat Petitioner's unexhausted ineffective assistance of counsel claims as procedurally defaulted. *Kelley,* 377 F.3d at 1351.

As discussed *supra* Part II.A., Petitioner must demonstrate cause and prejudice, or, alternatively, a miscarriage of justice, to overcome the procedural bar. Petitioner has not attempted to establish cause, however, it is abundantly clear from the record that

cause does not exist to overcome the procedural bar. As an initial matter, the bases for all of the ineffective assistance of counsel claims that Petitioner has added in his § 2254 Petition were available to Petitioner, and should have been known to counsel, when Petitioner filed his state habeas petition. Further, the failure of Petitioner's state habeas counsel to present those claims in Petitioner's state habeas petition cannot constitute cause. *Isaacs*, 300 F.3d at 1256. Further, the Court finds that Petitioner cannot demonstrate prejudice resulting from the new allegations of ineffective assistance of counsel. Additionally, Petitioner cannot show that the extraordinary miscarriage of justice exception applies to this case.

For the reasons discussed above, the Court finds that the following claims are unexhausted and are procedurally barred: (1) Petitioner's claim that his counsel provided ineffective assistance because trial counsel did not adequately litigate the issue of unadjudicated offenses (§ 2254 Petition Claim 14 n.40); (2) Petitioner's claim that his trial and appellate counsel provided ineffective assistance by not litigating the change of venue issue adequately (*id.* Claim 11, n.38 & 61); (3) Petitioner's claim that his trial and appellate counsel provided ineffective assistance by not litigating adequately the issue of the trial court's improperly commenting on Petitioner's silence (*id.* Claim 12, n.39); (4) Petitioner's claim that the trial court erred by failing to admit polygraph

evidence during the sentencing phase of Petitioner's trial (*id.* Claim 13);[5] (5) Petitioner's claim that his trial and appellate counsel provided ineffective assistance of counsel because Petitioner's counsel inadequately litigated the issue of admissibility of polygraph evidence during the guilt and sentencing phases of Petitioner's trial (*id.* Claim 13, n.40); (6) Petitioner's trial and appellate counsel were ineffective because counsel did not litigate adequately the issue of similar transaction evidence (*id.* Claim 14, n.41); (7) Petitioner's trial and appellate counsel were ineffective because counsel did not litigate adequately the issue of Agent Hazelwood's testimony (*id.* Claim 15, n.42); (8) Petitioner's trial and appellate counsel provided ineffective assistance because counsel failed to litigate adequately the issue of the State's commenting on Petitioner's right to silence (*id.* Claim 16, n.44); (9) Petitioner's trial and appellate counsel rendered ineffective assistance by failing to litigate adequately the issue of allegedly unconstitutionally seized evidence (*id.* Claim 18, n.47); (10) Petitioner's trial and appellate counsel were ineffective by failing to litigate adequately the admissibility of handwriting expert testimony (*id.* Claim 19, n.48); (11) Petitioner's

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[5] Petitioner has not responded to Respondent's allegations that the portion of Claim 13 relating to Petitioner's allegations that the trial court erred by refusing to admit polygraph evidence during the sentencing phase of Petitioner's trial is unexhausted. The Court finds that Petitioner has failed to present that claim to the state courts, and that the claim consequently is unexhausted.

trial and appellate counsel provided ineffective assistance by failing to litigate adequately the admissibility of Petitioner's statement (*id.* Claim 20, n.50); (12) Petitioner's trial and appellate counsel were ineffective because counsel failed to litigate adequately the issue of Petitioner's innocence of the death penalty (*id.* Claim 21, n.51); (13) Petitioner's trial and appellate counsel were ineffective by failing to litigate adequately the issue of Petitioner not receiving a probable cause hearing (*id.* Claim 23, n.61); (14) Petitioner's trial and appellate counsel provided ineffective assistance by failing to litigate adequately the issue of Petitioner receiving a sentence for murder and feticide (*id.* Claim 24, n.63); (15) Petitioner's trial and appellate counsel were ineffective because they failed to litigate adequately the issue of the trial court's asking voir dire questions that conflicted with Petitioner's presumption of innocence (*id.* Claim 25, n.65); (16) Petitioner's trial and appellate counsel were ineffective by failing to litigate adequately the issue of how the indictment against Petitioner was obtained (*id.* Claim 26 (First), n. 66); (17) Petitioner's trial and appellate counsel provided ineffective assistance by failing to litigate adequately the trial court's use of the term "foreman" instead of "foreperson" (*id.* Claim 26 (Second), n.66); (18) Petitioner's trial and appellate counsel were ineffective by failing to litigate adequately the selection procedures for the grand jury and jury (*id.* Claim 28 (Second), n.69); (19) Petitioner's trial and appellate counsel rendered ineffective assistance by failing to litigate adequately the constitutionality of Georgia's Unified Appeal

Procedure (*id.* Claim 29, n.70); (20) Petitioner's trial and appellate counsel provided ineffective assistance because they failed to litigate adequately the issue of death qualification of the jury (*id.* Claim 30, n.71); (21) Petitioner's trial and appellate counsel were ineffective because they failed to litigate adequately the trial court's use of jury instructions that shifted the burden of proof to Petitioner (*id.* Claim 33, n.74); (22) Petitioner's trial and appellate counsel provided ineffective assistance by failing to litigate the trial court's jury charges adequately (*id.* Claim 34, n.34); and (23) Petitioner's trial and appellate counsel failed to litigate adequately the issue of Anna Wallin's testimony (*id.* Claim 35, n.76). Petitioner thus may not obtain § 2254 relief based on those claims.

## IV. Conclusion

ACCORDINGLY, the Court finds that the following claims are procedurally barred: (1) Petitioner's claim that his counsel provided ineffective assistance because trial counsel did not adequately litigate the issue of unadjudicated offenses (§ 2254 Petition Claim 14 n.40); (2) Petitioner's claim that his trial and appellate counsel provided ineffective assistance by not litigating the change of venue issue adequately (*id.* Claim 11, n.38 & 61); (3) Petitioner's claim that his trial and appellate counsel provided ineffective assistance by not litigating adequately the issue of the trial court's improperly commenting on Petitioner's silence (*id.* Claim 12, n.39); (4) Petitioner's claim

that the trial court erred by failing to admit polygraph evidence during the sentencing phase of Petitioner's trial (*id.* Claim 13);[6] (5) Petitioner's claim that his trial and appellate counsel provided ineffective assistance of counsel because Petitioner's counsel inadequately litigated the issue of admissibility of polygraph evidence during the guilt and sentencing phases of Petitioner's trial (*id.* Claim [illegible], n.40); (6) Petitioner's trial and appellate counsel were ineffective because counsel did not litigate adequately the issue of similar transaction evidence (*id.* Claim 14, n.41); (7) Petitioner's trial and appellate counsel were ineffective because counsel did not litigate adequately the issue of Agent Hazelwood's testimony (*id.* Claim 15, n.42); (8) Petitioner's trial and appellate counsel provided ineffective assistance because counsel failed to litigate adequately the issue of the State's commenting on Petitioner's right to silence (*id.* Claim 16, n.44); (9) Petitioner's trial and appellate counsel rendered ineffective assistance by failing to litigate adequately the issue of allegedly unconstitutionally seized evidence (*id.* Claim 18, n.47); (10) Petitioner's trial and appellate counsel were

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[6] Petitioner has not responded to Respondent's allegations that the portion of Claim 13 relating to Petitioner's allegations that the trial court erred by refusing to admit polygraph evidence during the sentencing phase of Petitioner's trial is unexhausted. The Court finds that Petitioner has failed to present that claim to the state courts, and that the claim consequently is unexhausted.

ineffective by failing to litigate adequately the admissibility of handwriting expert testimony (*id.* Claim 19, n.48); (11) Petitioner's trial and appellate counsel provided ineffective assistance by failing to litigate adequately the admissibility of Petitioner's statement (*id.* Claim 20, n.50); (12) Petitioner's trial and appellate counsel were ineffective because counsel failed to litigate adequately the issue of Petitioner's innocence of the death penalty (*id.* Claim 21, n.51); (13) Petitioner's trial and appellate counsel were ineffective by failing to litigate adequately the issue of Petitioner not receiving a probable cause hearing (*id.* Claim 23, n.61); (14) Petitioner's trial and appellate counsel provided ineffective assistance by failing to litigate adequately the issue of Petitioner receiving a sentence for murder and feticide (*id.* Claim 24, n.63); (15) Petitioner's trial and appellate counsel were ineffective because they failed to litigate adequately the issue of the trial court's asking voir dire questions that conflicted with Petitioner's presumption of innocence (*id.* Claim 25, n.65); (16) Petitioner's trial and appellate counsel were ineffective by failing to litigate adequately the issue of how the indictment against Petitioner was obtained (*id.* Claim 26 (First), n. 66); (17) Petitioner's trial and appellate counsel provided ineffective assistance by failing to litigate adequately the trial court's use of the term "foreman" instead of "foreperson" (*id.* Claim 26 (Second), n.66); (18) Petitioner's trial and appellate counsel were ineffective by failing to litigate adequately the selection procedures for the grand jury and jury (*id.* Claim 28 (Second), n.69); (19) Petitioner's trial and

appellate counsel rendered ineffective assistance by failing to litigate adequately the constitutionality of Georgia's Unified Appeal Procedure (*id.* Claim 29, n.70); (20) Petitioner's trial and appellate counsel provided ineffective assistance because they failed to litigate adequately the issue of death qualification of the jury (*id.* Claim 30, n.71); (21) Petitioner's trial and appellate counsel were ineffective because they failed to litigate adequately the trial court's use of jury instructions that shifted the burden of proof to Petitioner (*id.* Claim 33, n.74); (22) Petitioner's trial and appellate counsel provided ineffective assistance by failing to litigate the trial court's jury charges adequately (*id.* Claim 34, n.34); (23) Petitioner's trial and appellate counsel failed to litigate adequately the issue of Anna Wallin's testimony (*id.* Claim 35, n.76); (24) Petitioner's claim concerning juror/bailiff misconduct based on Petitioner's contention that a bailiff responded to questions from jurors (*id.* Claim 1); (25) Petitioner's claim that the trial court failed to excuse jurors who indicated that they expected Petitioner to prove his innocence (*id.* Claim 8); (26) Petitioner's claim that the trial court erred by failing to excuse Juror Kenneth Craig for cause (*id.* Claim 9); and (27) Petitioner's claim that the trial court erred by excusing certain jurors based on hardship (*id.* Claim 10).

IT IS SO ORDERED, this the 15th day of August, 2005.

/s/ Harold Murphy
UNITED STATES
DISTRICT JUDGE

[SEAL] **Supreme Court of Georgia**
Case No. S99R0204

Atlanta February 20, 2001

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

JAMES RAY WARD A/K/A JAMIE RAY WARD v. TONY TURPIN, WARDEN

It appearing that further findings of fact and conclusions of law are required in this case, it is stricken from the Court's docket and remanded to the habeas court for further proceedings. Upon remand:

1. The habeas court shall permit questioning of petitioner's trial counsel concerning the reasonableness of their professional conduct regarding scientific testing of apparent blood stains on evidence presented at trial and shall, in a manner that ensures fairness to the respondent, authorize access to said evidence by petitioner for the purposes of scientific testing. Thereafter, the habeas court shall consider any evidence presented pursuant to this order, shall hear and consider other, related evidence if deemed warranted by the habeas court, and shall make additional findings of fact and conclusions of law regarding the relevant portions of petitioner's claim that his trial counsel rendered ineffective assistance. See *Strickland v. Washington*, 466 U. S. 668 (1984).

2. The habeas court shall clarify the portion of its order wherein it concluded that "defense counsel were not ineffective in failing" to raise a claim on

direct appeal regarding the alleged failure of the trial court to administer the bailiff oath. Particularly, the habeas court shall clarify its conclusion that "the arguments clearly have no merit." The habeas court shall make any other related findings of fact or conclusions of law that it shall deem warranted. See *Hannah v. State*, 212 Ga. 313, 319-24(6) (1956); see also *Turpin v. Todd,* 268 Ga. 820, 828-30(2)(b) (1997).

Upon the conclusion of the proceedings on remand, timely appeal or petition for certificate of probable cause to appeal will be permitted in the manner provided by law.

**SUPREME COURT OF**
**THE STATE OF GEORGIA**
Clerk's Office, Atlanta

[SEAL] I certify that the above is a true extract from the Minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Lynn M. Stinchcomb, Chief Deputy Clerk

**IN THE SUPERIOR COURT OF BUTTS COUNTY STATE OF GEORGIA**

| | | |
|---|---|---|
| **JAMES RAY WARD, a/k/a JAMIE RAY WARD,** | ) | |
| **Petitioner,** | ) | |
| **v.** | ) | **CIVIL ACTION NO. 93-V-217** |
| **FREDRICK HEAD, WARDEN, Georgia Diagnostic and Classification Center,** | ) | **HABEAS CORPUS** |
| **Respondent.** | ) | |

**ORDER**

(Filed Dec. 20, 2002)

On July 12, 1991, Petitioner was convicted of malice murder, felony murder, kidnapping with bodily injury, and feticide by a jury in the Superior Court of Walker County, and was sentenced to death. Petitioner filed a Petition for Writ of Habeas Corpus on April 19, 1993, and an Amended Petition on June 15, 1995. On August 27, 1998, this Court entered an Order denying the Writ of Habeas Corpus. On February 20, 2001, the Georgia Supreme Court remanded this action back to this Court with the following direction:

> The habeas court shall permit questioning of petitioner's trial counsel concerning the reasonableness of their professional conduct regarding scientific testing of apparent blood stains on evidence presented at trial and shall, in a manner that ensures fairness to

> the respondent, authorize access to said evidence by petitioner for the purposes of scientific testing. Thereafter, the habeas court shall consider any evidence presented pursuant to this order, shall hear and consider other, related evidence if deemed warranted by the habeas court, and shall make additional findings of fact and conclusions of law regarding the relevant portions of petitioner's claim that his trial counsel rendered ineffective assistance. (Citation omitted).
>
> The habeas court shall clarify the portion of its order wherein it concluded that 'defense counsel were not ineffective in failing' to raise a claim on direct appeal regarding the alleged failure of the trial court to administer the bailiff oath. Particularly, the habeas court shall clarify its conclusion that 'the arguments clearly have no merit.' The habeas court shall make any other related findings of fact or conclusions of law that it shall deem warranted. (Citations omitted).

Pursuant to the Supreme Court's remand Order, this Court authorized testing to be performed on blood stains on four items of evidence, previously marked as State's Exhibits 206, 208, 209, and 210, admitted in the case of *Ward v. State,* No. 91-CR-15987. *See* Order of January 17, 2002. Testing was performed and a final report was submitted on August 15, 2002, and filed by mail on September 25, 2002. The results of that report are essentially as follows: The blood stain on State's Exhibit 206, the sample taken from Jerry Wayne Alexander's truck, is

rattlesnake blood. With respect to the remaining blood stains cuttings taken from State's Exhibit 208-210 (the victim's quilt, which was found on Petitioner's property), testing was inconclusive as to some of the samples, while other samples were identified as mouse blood. Since the blood found on the victim's quilt did not come from a snake, there is no link between the victim and Jerry Wayne Alexander; accordingly, Petitioner has failed to demonstrate that "'there is a reasonable probability that, but for counsel's [conduct regarding scientific testing of apparent blood stains on evidence presented at trial], the result of the proceedings would have been different.'" *Turpin v. Christenson*, 269 Ga. 226, 232 (1998), citing *Strickland v. Washington*, 466 U.S. 668 (1984).

In his Petition, Petitioner claims that the following improprieties occurred at trial: (a) "high degree of familiarity and informal interaction" between the jury and bailiffs; (b) a failure to administer and comply with the bailiff oath; and, (c) bailiff misconduct in responding to juror's questions. With respect to the Supreme Court's directive to clarify this Court's prior ruling that Petitioner's claims have no merit, this Court finds, in conjunction with its prior Order denying the Writ of Habeas Corpus, that Petitioner has not met the "cause" requirement to overcome the bar of procedural default as to (a)-(c) as Petitioner has failed to establish either: (1) an external factor precluding Petitioner from previously raising this claim, or (2) ineffective assistance of counsel given that

Petitioner has not established the "cause" to overcome the procedural default of this claim as he has failed to "affirmatively show" that the bailiff oath was not given, and as he has further failed to establish that the bailiffs engaged in any conduct that resulted in "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Turpin v. Todd*, 268 Ga. 820, 828 (1997). There is no affirmative evidence that the bailiff oath was not taken, no evidence that there was any question posed by the jury that was not answered by the trial court in open court, and no evidence to support Petitioner's allegation that a fifth question was asked about parole eligibility and not relayed to the trial judge. Accordingly, Petitioner's claim fails.

**SO ORDERED**, this 18th day of December, 2002.

/s/ Elizabeth E. Long
JUDGE ELIZABETH E. LONG
Judge of Superior Court
Sitting by Designation in
Butts County

cc:

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**IN THE SUPERIOR COURT OF BUTTS COUNTY**
**STATE OF GEORGIA**

| | | |
|---|---|---|
| **JAMES RAY WARD, a/k/a JAMIE RAY WARD,** | : | |
| **Petitioner,** | : | |
| **v.** | : | **HABEAS CORPUS** |
| **TONY TURPIN, Warden, Georgia Diagnostic and Classification Center,** | : | **Case No. 93-V-217** |
| **Respondent.** | : | |

## ORDER

(Filed Aug. 28, 1998)

Petitioner's First Amended Petition for Writ of Habeas Corpus (the "Amended Petition") as to his conviction and sentence in the Superior Court of Walker County is before the Court. Having considered the Amended Petition, Respondent's Answer, relevant portions of the trial record, evidence admitted at the hearing on the merits, and the arguments of counsel made at the hearing and in the briefs, the Court makes the following findings of fact and conclusions of law, pursuant to O.C.G.A. § 9-14-49.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On direct appeal, the Supreme Court of Georgia found the facts of this case as follows:

The victim's husband left for work at 6:00 a.m. on August 17, 1989. When he returned from work that evening, the 23-year-old victim, who was five months pregnant, was missing, along with her car. Their 22-month-old daughter was at home by herself.

When the police arrived later that evening, many friends and relatives were present. At first, nothing appeared to be missing except for the victim and her car, but eventually it was learned that a telephone cord had been forcibly removed from the wall jack (leaving the plug), that most of the victim's underwear had been removed from her dresser drawer, and that a quilt and a baby blanket had been taken.

The victim's car was discovered the next day on an unpaved logging road. Her body was discovered the day after that in a trash dump several miles away. Ligature marks around her wrists and ankles indicated she had been bound. Three of her ribs were broken and there were various bruises about her body. Her fetus was in a partially delivered condition. The mother died of asphyxiation resulting from her pharynx being stuffed with wadded-up paper towels. The death of the mother resulted in the destruction of the fetus.

No clear suspects were developed for several months. Then, early in the morning of December 18, 1989, the defendant, wearing gloves and a stocking mask, broke into a

Gordon County home and kidnapped a woman from her bed as she lay sleeping with her nine-year-old daughter. He drove the woman to an abandoned farmhouse, forced her to model negligees he had brought with him, and raped her. Then he took her to another abandoned house and raped her again. He told her that he had killed two people and pointed out a "good place" to "dump bodies" if she ever wanted to. He also told her he had been watching her and told her some things about her personal situation that a stranger should not have known. He returned her to her home. Later, she discovered that some of her underwear was missing.

The Gordon County police arrested the defendant at his residence. The defendant's home was unfinished inside. Most of the walls were not sheetrocked and there was no running water and, except for the bedroom, no electricity. The unfinished rooms were full of boxes containing several thousands of dollars worth of lingerie and adult magazines. The defendant maintained notebooks carefully labelling and indexing magazines and lingerie catalogs (including descriptions and numerical ratings of women in the magazines). The officers found scraps of paper with physical descriptions of and tag numbers for women; dates, times and locations of observations; directions to their homes; newspaper clippings about rapes, murders and missing women; newspaper photographs of women; and driver's licenses and insurance cards belonging to various women.

> In addition, officers found handwritten directions to the home of the victim in this case, her swimming suit bottom, her quilt and baby blanket, and – hidden under a pile of wood – six newspaper articles about her disappearance.
>
> On January 18, 1990, the defendant admitted to police that he had visited the victim's home to check on a well he had helped drill earlier and had spoken to her. He said: "I don't know if I done anything to the girl or not. I could have done it . . . I been a liar all my life. I need some help. If I done it, I didn't mean for it to happen and I am sorry."

*Ward v. State*, 262 Ga. 293(1) (1992).

On August 3, 1990, Petitioner was indicted by a Walker County grand jury for malice murder, felony murder, burglary, kidnapping with bodily injury, and feticide. (Rec. 5.)[1] On August 21, 1990, Rossville attorneys Christopher A. Townley and David J. Dunn were appointed to represent him at his capital trial. (Rec. 17.)

On July 12, 1991, Petitioner was convicted of malice murder, felony murder, kidnapping with bodily injury, and feticide by a jury in the Superior Court of

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[1] Citations to the record will be in the following format:
Tr. [page number] = trial transcript
Rec. [page number] = record on appeal
Hab. [page number] = habeas hearing transcript
Px. [number] = Petitioner's exhibits at habeas hearing

Walker County, and was sentenced to death. (Tr. 4866, 5083.) Townley and Dunn were appointed to handle the direct appeal of the guilty verdict, (Tr. 5094), which the Supreme Court of Georgia affirmed. *Ward v. State*, 262 Ga. 293 (1992). The United States Supreme Court denied Petitioner's Petition for Writ of Certiorari on January 19, 1993. *Ward v. Georgia*, 506 U.S. 1085 (113 S. Ct. 1061, 122 L. Ed. 2d 366) (1993).

Petitioner filed a Petition for Writ of Habeas Corpus on April 19, 1993, and an Amended Petition on June 15, 1995. The Court conducted a hearing on the merits in this action on July 31, October 20 and 21, and December 22, 1997. Petitioner presented affidavit and record evidence regarding his childhood and his medical, psychological, and social history; current evaluations by a forensic psychiatrist and a clinical and forensic psychologist were also submitted. Respondent presented the testimony of Townley, Dunn, and others involved in both the prosecution and defense of the case, as well as additional testimony regarding Petitioner's childhood.

## PETITIONER'S CLAIMS FOR RELIEF

Petitioner sets forth fourteen arguments in his Post-Hearing Brief in Support of Petition for Writ of Habeas Corpus, which encompass the claims in his Amended Petition:

**(1) Habeas Proceedings**

Petitioner asks this Court to reconsider its denial of his Motion for Funds for Attorneys' Fees, Investigation Fees, Expert Assistance and Hearing Expenses; his Motion to Permit Expert Testing of Physical Evidence; and his request for a continuance of the evidentiary hearing. After a review of these issues, the Court declines to reverse its decisions.

**(2) Jury Communication with Bailiff**

Petitioner claims that the following improprieties occurred at trial: (a) a "high degree of familiarity and informal interaction" between the jury and bailiffs; (b) a failure to administer and comply with the bailiff oath; and (c) bailiff misconduct in responding to jurors' questions.

> A procedural bar to asserting a claim on habeas corpus arises if the defendant failed to timely object to any alleged error or deficiency at trial or on appeal. The procedural bar, however, may be overcome if the petitioner shows, first, an adequate cause for failing to raise the issue earlier and, second, actual prejudice resulting from the alleged error or errors.

*Turpin v. Todd*, 268 Ga. 820, 824 (1997). "To show cause, [Petitioner] must demonstrate that 'some objective factor external to the defense impeded counsel's efforts to raise the claim that has been procedurally defaulted' [Cits.]"; "[i]neffective assistance of

counsel under *Strickland v. Washington*, 466 U.S. 668 (104 S. Ct. 2052, 80 L. E. [sic] 2d 674) (1984), also constitutes 'cause,' but attorney error that falls short of that standard does not." *Turpin v. Christenson*, 269 Ga. 226, 229 (1998). "To show prejudice, [Petitioner] must demonstrate actual prejudice that 'worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. [Cits.]" *Id.* at 229-30.

Consideration of the alleged jury-bailiff communication improprieties is procedurally barred, as these arguments could have been raised on direct appeal. Petitioner has not met the cause requirement to overcome this bar for the claims set forth in (a) and (b) above. No external factor precluded defense counsel from raising these claims; defense counsel were not ineffective in failing to do so, as the arguments clearly have no merit.

As for the alleged impropriety set forth in (c) above, Petitioner has failed to meet the prejudice requirement to overcome the procedural bar. While improper communication between bailiff and jury creates a presumption of prejudice on direct appeal, Petitioner has the burden of establishing actual prejudice in a habeas corpus action. *Turpin v. Todd*, *supra* at 830. Petitioner has not met this burden.

"The only exception to the cause and prejudice test is the granting of habeas corpus relief to avoid a 'miscarriage of justice,' which is an extremely high standard." *Turpin v. Christenson*, *supra* at 229; *citing*

*Valenzuela v. Newsome*, 253 Ga. 793(4) (1985). Petitioner's allegations regarding jury-bailiff communications do not rise to this level.

**(3) Ineffective Assistance of Counsel**

To establish a claim of ineffective assistance, Petitioner has the burden of showing that: (1) his counsels' performance was deficient; and (2) the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668 (104 S. Ct. 2052, 80 L. E. [sic] 2d 674) (1984); *Smith v. Francis,* 253 Ga. 782(1) (1985).

To meet the first prong of this test, Petitioner "must demonstrate that his trial counsel's performance was not reasonably effective in light of the circumstances confronting his counsel before and during the trial." *Turpin v. Christenson*, *supra* at 232. "Hindsight is not employed, and [Petitioner's] counsel is afforded a strong presumption that their conduct fell within a wide range of reasonable professional conduct and that their significant decisions were made in the exercise of reasonable professional judgment." *Id.* To meet the second prong of the *Strickland* test, Petitioner "must demonstrate that 'there is a reasonable probability (*i.e.*, a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Cit.]" *Id.*

Petitioner sets forth five main arguments in support of his claim of ineffective assistance of counsel,

along with various "other instances" of ineffectiveness. At the outset, the Court finds no merit in Petitioner's argument that defense counsel lacked the necessary knowledge and experience to handle this death penalty case. At the time of Petitioner's trial, attorney Townley had previously been involved in the prosecution of at least three death penalty cases, and had conducted the defense in a death penalty case that ultimately resulted in a guilty plea. (Hab. 203.) Attorney Dunn had been the lead prosecutor on two death penalty cases and assisted on two others. (Hab. 486.)

*A. Photographs of Victim*:

The testimony of defense witnesses Sheila Cameron, Mike Lau, and Johnny Bass was presented for the purpose of casting suspicion upon previous suspect Jerry Wayne Alexander, *i.e.*, by placing someone that looks like him at the site of the illegal dump on the day before the victim's body was found. (Tr. 4459.) Because the testimony also created a question as to when the victim's body had been placed in the dump, it opened the door to the introduction of certain photographs of the body, (Tr. 4418, 4460), which had previously been ruled inadmissible, (Tr. 2290). Petitioner claims that defense counsel were ineffective in that they opened this door.

Defense counsels' strategic decision to present this testimony in support of their theory that Alexander, not Petitioner, was the perpetrator of the crime

was within the bounds of reasonable professional judgment. Thus, Petitioner has not shown that defense counsels' performance in this regard was deficient.

*B. DNA Testing*:

Petitioner claims that defense counsel should have had DNA testing conducted on blood found on the victim's quilt, which was discovered during a search of Petitioner's property. If the blood had been shown to have come from a snake, a link between the victim and Jerry Wayne Alexander could have been made, as Alexander claimed that bloodstains found in the back of his truck were from skinned rattlesnakes.

The Court has ruled on this issue, in the context of its January 28, 1998 Order denying Petitioner's Motion to Permit Expert Testing of Physical Evidence. In that Order, the Court found that "[e]ven assuming *arguendo* that the testing in question were to show that the blood on the items of evidence came from the same animal, this result would not be sufficient to create the reasonable probability of a different outcome at trial." The quilt was found on Petitioner's property, not Alexander's. As Petitioner has failed to meet the second prong of the *Strickland* test, defense counsels' performance on this issue does not constitute ineffective assistance.

*C. Background Investigation*:

"[B]efore selecting a strategy, counsel must conduct a reasonable investigation into the defendant's background for mitigation evidence to use at sentencing." *Turpin v. Christenson*, *supra* at 239. Petitioner claims that defense counsel failed to effectively investigate and present evidence regarding his childhood and his positive character traits.

Although defense counsel decided not to present evidence regarding Petitioner's childhood, their investigation into the issue was certainly reasonable. Information was obtained from Petitioner's biological mother, but she ultimately refused to testify on her son's behalf. (Hab. 340.) Defense counsel talked to Petitioner's siblings, but decided not to use their testimony because they had come from the same environment and, unlike Petitioner, had "apparently done pretty well for themselves." (Hab. 339.) In addition to talking to family members, defense counsel obtained Petitioner's school, medical, and psychological records. (Hab. 282.) Petitioner has failed to show that defense counsels' investigation or strategic decision not to present evidence on this issue was deficient.

*D. Mental Health Expert*:

Petitioner claims that defense counsel were ineffective in failing to obtain the assistance of an independent mental health expert. The Affidavit of Dr. Mark J. Mills is offered as evidence that the

diagnosis of antisocial personality disorder was incorrect. (Px. 1.) However, it is clear that Dr. Mills' diagnosis of fetishism was based upon incomplete information, (Hab. 558-693), thus this testimony is not persuasive.

Although the trial court granted defense counsels' Motion for Funds for Employment of Privileged, Competent Psychiatrist, (Rec. 560), "not every offer extended by the court must be accepted by defense counsel." *Curry v. Zant*, 258 Ga. 527, 528 (1988). The decision not to retain an independent mental health expert was based on several factors, including Petitioner's strong opposition to the presentation of any type of mental illness defense, (Hab. 289), the trial court's caveat that "counsel act[] reasonably in their selection and use of the expert," (Hab. 331, 386), and the lack of indicators that a mental illness defense or mitigation evidence existed, (Px. 16, 17, and 18; Hab. 317).

Defense counsels' investigation into a potential mental illness defense and mitigation evidence was reasonable, as was the decision to pursue a trial strategy that did not require the retention of an independent mental health expert.

*E. Criminal "Profiling" Expert*:

Petitioner claims that defense counsel should have obtained an expert witness to rebut the testimony of FBI Special Agent Robert Hazelwood regarding the profiling of sex offenders, and should not have

used Agent Hazelwood as a witness during the penalty phase.

During the guilt-innocence phase, defense counsel utilized cross-examination in an attempt to undermine Agent Hazelwood's testimony regarding the similarities between this case and the Donna Rich case. (Tr. 4242.) The strategic decision to use cross-examination rather than a rebuttal witness falls within the bounds of reasonable professional judgment.

Defense counsels' strategic decision to use Agent Hazelwood's testimony during the penalty phase was based on the jurors' positive response to the witness, the potential enhancement of credibility with the jury, and a reasonable expectation that testimony would be elicited in support of the argument that Petitioner "was not someone who was out there to rape and kill people." (Hab. 344-45.) Thus, this aspect of defense counsels' performance was not deficient.

As for Petitioner's claims regarding "other instances" of ineffectiveness, these arguments are either addressed elsewhere in this Order, or have been found by the Court, after a review of the record, to have no merit.

**(4) *Brady* Violations**

Petitioner alleges that the State failed to provide defense counsel with the following items of evidence,

in violation of *Brady v. Maryland*, 373 U.S. 83 (83 S. Ct. 1194, 10 L. Ed. 2d 215) (1963):

A. Calhoun City police officer's report regarding GBI Agent's questioning of Petitioner in the Donna Rich case. (Px. 27.)

B. GBI Agent's reports regarding criminal incidents where Petitioner was a suspect, but the victims could not identify him as the perpetrator. (Px. 33.)

C. Walker County deputy sheriff's notes regarding reports that the victim had been seen leaving the house in her car, crying, with an unidentified person. (Px. 29.)

D. Walker County deputy sheriff's note stating that the victim had expected someone to come over and check the well. (Px. 32.)

E. Face sheet for GBI polygraph of Jerry Wayne Alexander, stating the reason for his questioning regarding the fire at Richard Puryear's house. (Px. 34.)

F. Walker County deputy sheriff's note stating that Puryear had said the victim's gown was in the house that burned. (Px. 28.)

G. Donna Rich's guilty plea in Floyd County to a theft by taking charge. (Px. 35.)

H. Walker County deputy sheriff's notes regarding the daughter of the victim

responding to the sight of other men (Px. 32.)

I. Walker County deputy sheriff's notes regarding the victim's background.(Px. 31.)

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, *supra* at 87. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Rogers v. State*, 257 Ga. 590, 592(3) (1987), *quoting United States v. Bagley*, 473 U.S. 667 (105 S. Ct. 3375, 87 L. E. [sic] 2d 481) (1985).

After consideration of each of these items of evidence in the context of the case as presented to the jury, the Court finds no reasonable probability that the result of the proceeding would have been different with their disclosure. As Petitioner has not established a *Brady* violation, his claims under *Giglio v. United States*, 405 U.S. 150 (92 S. Ct. 763, 31 L. Ed. 2d 104) (1972), also fail.

Accordingly, the Court finds no merit in Petitioner's claim that defense counsels' failure to obtain these items of evidence or to argue the issue on appeal constitutes ineffective assistance.

**(5) Innocence**

"It is well settled that '[a]fter an appellate review the same issue[] will not be reviewed on habeas corpus.'" *Turpin v. Christenson*, *supra* at 227-28, *quoting Elrod v. Ault*, 231 Ga. 750 (1974). The Supreme Court of Georgia held on direct appeal that "[t]he evidence, although circumstantial, supports the conviction." *Ward v. State*, *supra* at 296(4). Thus, consideration of Petitioner's claim of innocence, based on a recitation of the evidence submitted to the jury, is barred.

To the extent that Petitioner's claim of innocence is based upon other allegations, such as ineffective assistance of counsel and *Brady* violations, those allegations are addressed elsewhere in this Order.

**(6) Evidence of Unadjudicated Criminal Offenses**

Petitioner claims that the trial court erred in admitting evidence of unadjudicated criminal offenses during the sentencing phase, and in failing to give his requested jury instruction regarding the standard of proof necessary for consideration of such offenses. Although Petitioner concedes that this issue has already been decided against him on direct appeal, *Ward v. State*, *supra* at 301(29), he claims that a subsequent 11th Circuit case rejected the rationale used by the Supreme Court of Georgia and constitutes a change in the law.

Because the language cited by Petitioner as support for this argument comes from a *special concurrence* in *Devier v. Zant*, 3 F.3d 1445, 1446-48 (11th Cir. 1993), it is not controlling and the argument has no merit.

**(7) *Witherspoon* Errors**

Since the Supreme Court of Georgia held on direct appeal that "[t]he trial court's rulings on the [death] qualifications of the prospective jurors were 'within the deference due the trial judge's determination,' [Cit.]," *Ward v. State*, *supra* at 300(22), Petitioner's claim that the trial court improperly excused five potential jurors for having reservations about the death penalty is barred.

To the extent Petitioner argues that these potential jurors were excused as a result of defense counsels' ineffective voir dire or failure to object, the Court finds, after a review of the record, that defense counsels' performance in this regard was not deficient. As there was no deficiency at trial, any failure to argue the issue on direct appeal could not form the basis for an ineffective assistance of counsel claim.

**(8) Reverse-*Witherspoon* Errors**

As noted in Section 7 above, the Supreme Court of Georgia found no error on direct appeal as to the trial court's death-qualification of prospective jurors.

To the extent Petitioner argues that the retention of certain prospective jurors was the result of defense counsels' ineffective voir dire or failure to object, the Court finds, after a review of the record, that defense counsels' performance in this regard was not deficient. As there was no deficiency at trial, any failure to argue the issue on direct appeal could not form the basis for an ineffective assistance of counsel claim.

**(9) Other Voir Dire Issues**

Petitioner claims that the trial court failed to remove for cause certain jurors and prospective jurors who either had fixed opinions about his guilt, indicated that they would expect him to prove that he was innocent, or indicated that they would be influenced by knowledge of other criminal accusations against him. These claims are procedurally barred because they were not raised on direct appeal.

To the extent Petitioner argues that the trial court's decisions were the result of defense counsels' ineffective voir dire or failure to object, the Court finds, after a review of the record, that defense counsels' performance in this regard was not deficient. As there was no deficiency at trial, any failure to argue the issue on direct appeal could not form the basis for an ineffective assistance of counsel claim. Accordingly, Petitioner has not met the cause requirement to overcome the procedural bar to these claims.

**(10) Juror Kenneth Craig**

Juror Craig realized during the course of the trial that he was acquainted with Anna Wallin, one of the State's witnesses, and had discussed with her certain events that might be relevant to the case. He advised the trial court, (Tr. 3292), and was questioned to ascertain the impact of these facts on his ability to be fair and impartial, (Tr. 3299-3308). Defense counsel ultimately chose to leave Craig on the jury, (Tr. 4836), because "there was something about him that [attorney Townley] liked," (Hab. 368). Petitioner argues that the trial court was required to remove Craig for cause and that defense counsels' decision to retain him constituted ineffective assistance.

As for Petitioner's ineffective assistance argument, the Court finds that defense counsels' strategic decision to retain this juror was an exercise of reasonable professional judgment that did not alter the result of the proceeding. Because there was no deficiency at trial, any failure to argue the issue on direct appeal could not form the basis for an ineffective assistance of counsel claim.

Petitioner's argument regarding the trial court's failure to remove this juror for cause is procedurally barred because it was not raised on direct appeal. No external factor precluded defense counsel from raising the claim and, as discussed above, defense counsel were not ineffective in failing to do so. Thus, Petitioner has not met the cause requirement to overcome the procedural bar.

**(11) Jurors Excused for Hardship**

Petitioner claims that the trial court excused a disproportionate number of apparently "pro-defense" prospective jurors for hardship reasons. This argument is procedurally barred, as it was not raised on direct appeal.

To the extent Petitioner argues that the trial court's decisions were the result of defense counsels' ineffective juror questioning, the Court finds, after a review of the record, that defense counsels' performance in this regard was not deficient. As there was no deficiency at trial, any failure to argue the issue on direct appeal could not form the basis for an ineffective assistance of counsel claim. Accordingly, Petitioner has not met the cause requirement to overcome the procedural bar to this claim.

**(12) Change of Venue**

Since the Supreme Court of Georgia held on direct appeal that "[t]here was no manifest error in the denial of Ward's motion for change of venue," *Ward v. State*, *supra* at 298(12), this claim is barred.

**(13) Jury Charges**

Petitioner argues that the trial court failed to give the requested and/or proper jury charges on mental capacity or emotional disturbance, residual doubt, unanimity, reasonable doubt, and the presumption of a life sentence. These claims are barred,

as the Supreme Court of Georgia found on direct appeal that the trial court's charge or failure to charge on each was proper. *Ward v. State*, *supra* at 301(27, 29, 30, and 31).

**(14) Cumulative Procedural and Substantive Errors**

Petitioner claims that the cumulative effect of errors committed by the trial court, defense counsel, and the State deprived him of a fair trial and reliable sentencing hearing. "This state does not follow a cumulative error rule of prejudice. Any error of record must stand or fall upon its own merits and is not aided or aggravated by the accumulative effect of other claims of error." *Polk v. State*, 225 Ga. App. 257, 259 (1997); *cited in Jenkins v. State*, 268 Ga. 468, 471 (1997). Accordingly, this argument has no merit.

**DISPOSITION**

Based upon the above findings of fact and conclusions of law, the Court hereby **ORDERS** that the writ of habeas corpus be **DENIED** as to Petitioner's conviction and sentence of death in the Superior Court of Walker County.

**SO ORDERED**, this 27th day of August, 1998.

/s/ Elizabeth E. Long
JUDGE ELIZABETH E. LONG
Superior Court of Fulton County
Atlanta Judicial Circuit

cc:

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 07-11360-P

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JAMES RAY WARD,

Petitioner-Appellant,

versus

WARDEN HILTON HALL,
Georgia Diagnostic Prison,

Respondent-Appellee.

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On Appeal from the United States District Court
for the Northern District of Georgia

- - - - - - - - - - - - - - - - - - - - - -

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed May 27, 2010)

Before: EDMONDSON, BIRCH and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en Banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch
UNITED STATES CIRCUIT JUDGE

ORIGINAL

Supreme Court, U.S.
FILED
OCT 28 2010
OFFICE OF THE CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 2010

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10-288

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JAMES RAY WARD,
*Petitioner,*

versus,

STEVEN UPTON, WARDEN,
*Respondent.*

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*On Petition for Writ of Certiorari*
*To the United States Court of Appeals for the Eleventh Circuit*

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR APPELLANT

# IN THE
# SUPREME COURT OF THE UNITED STATES

October Term, 2010

10-288

Supreme Court, U.S.
FILED
OCT 28 2010
OFFICE OF THE CLERK

**JAMES RAY WARD,**
*Petitioner,*

**versus,**

**STEVEN UPTON, WARDEN,**
*Respondent.*

*On Petition for Writ of Certiorari*
*To the United States Court of Appeals for the Eleventh Circuit*

*MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS*

COMES NOW Respondent JAMES RAY WARD, and pursuant to Sup. Ct. Rule 39, moves for leave to proceed in forma pauperis.

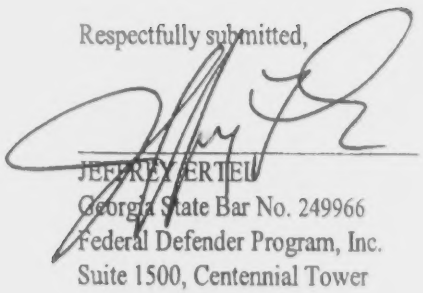
1) Mr. Ward was determined indigent by the United States District Court for the Northern District of Georgia. On May 3, 2004, pursuant to 28 U.S.C. §848(q), counsel was appointed to represent Mr. Ward in all stages of his habeas corpus proceedings.

2) Mr. Ward remains indigent and wishes to file a response to the petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit which has been filed by Petitioner.

WHEREFORE, Mr. Ward asks this Court to grant his motion and allow him to proceed in forma pauperis.

Dated this 28thday of October, 2010.

Respectfully submitted,



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## INTRODUCTION

Petitioner Hall seeks review of the unremarkable decision by the United States Court of Appeals for the Eleventh Circuit finding misconduct by the jury/bailiffs during the sentencing phase of Respondent Ward's capital trial and concluding that the misconduct required a grant of habeas relief. Hall's petition is premised in large part on claimed factual findings by the state habeas court that were in fact never made. In addition, Hall complains that the record has not been fully developed without acknowledging the multiple opportunities he was provided by the state court to submit evidence to counter Ward's allegations. Furthermore, Hall's petition misrepresents both Georgia law and the Eleventh Circuit's ruling. When the actual state record is considered, in the context of accurate Georgia law, the Eleventh Circuit's decision is unremarkable and does not present any issue worthy of this Court's attention. Finally, Ward would be entitled to relief even if this Court were to grant Hall's petition.

## STATEMENT OF THE CASE

### A. Conviction and Death Sentence.

Ward was convicted of abducting and killing Nikia Gilbreath. She died from asphyxiation resulting from wadded-up paper towels in her throat. R1-30 at 2583-84. At the time of her death, Mrs. Gilbreath was approximately five months pregnant and the fetus did not survive. *Id* at 2317; 2604. The state's pathologist acknowledged the death might have been accidental as the paper could have been placed in Mrs. Gilbreath's mouth to keep her from shouting and she panicked and swallowed the paper. *Id* at 2606; 2607. During the sentencing phase, the prosecution invoked three statutory aggravating factors: (1) the murder was

committed by a person with a prior record of conviction for a capital felony (O.C.G.A. § 17-10-30 (b)(1))[1]; (2) the murder was committed while the offender was engaged in the commission of another capital felony (O.C.G.A. § 17-10-30 (b)(2)) - - the kidnapping of Ms. Gilbreath; and (3) the murder "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." O.C.G.A. § 17-10-30(b)(7). Although the jury found that the last aggravator was not applicable, the jury recommended that a sentence of death be imposed.

**B. Allegations and Evidence of Jury/Bailiff Misconduct in State Habeas Proceedings.**

**1. Jurors Asked About Parole.**

After Ward's conviction and sentence were affirmed on direct appeal, he filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia. Ward alleged, inter alia, that improper communications had occurred between the bailiff and the jury concerning the subject of parole in violation of the right to be tried by an impartial jury. As proof of his allegations, he presented affidavits from several jurors, as permitted by Georgia law.[2] Juror Kenneth Craig, for example, admitted in his affidavit that he personally questioned a bailiff about parole-related issues during deliberations:

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[1]This "prior" record concerned an abduction/rape that occurred after Ms. Gilbreath's death.

[2]O.C.G.A. § 9-14-48. *See also* R1-6, Exh. 59 at 12 (state habeas court agrees with Ward's explanation that "the affidavit provision in the habeas statute is intended to benefit indigent petitioners who don't have the resources to bring all these witnesses in here, to pay their fees," and that the State had the resources necessary "to conduct depositions of witnesses whose affidavits are presented by the petitioner in this case."); *id.* at 9 (state habeas court acknowledges warden's right to depose Ward's affiants and favors telephonic depositions.)

> One of the things that I know I was worried about was whether [Respondent] would ever be able to get out and do something like this again. I really did not think he deserved the death penalty, partly because I had some strong doubts about his guilt. But I believed at the time – and other jurors shared this belief – that a life sentence meant that he would be able to get out on parole after a while.
>
> Before we sentenced Ward to death, I asked one of the bailiffs – a woman I think – if life and death were our only options. I wanted to know whether life really meant life and, if it didn't mean life, whether there was a life without parole choice. But the bailiff told me that jurors couldn't ask questions like that, that the judge's instructions were what we had to go on. I never got an answer to my question.
>
> . . . .
>
> Today I wish that we had had the choice of sentencing Ward to life without the possibility of parole. I know that if we had had that choice, I would definitely have voted for a life sentence, because I just wanted to be sure that a person like him would be off the streets, whether or not he was actually guilty of the crime.

R1-6, Exh. 65 at 882-83.

Juror Keith Dunsmore also swore that jurors had contact with a bailiff concerning parole eligibility:

> Other jurors also had some uneasiness with the death penalty in this case. We certainly did not want Mr. Ward to be out on the street. I remember that we asked a bailiff whether we could sentence Mr. Ward to life without the possibility of parole. The bailiff returned with the answer that such a sentence was not an option. If the life without parole option had been available at the time, I and other jurors may well have decided that this was the appropriate sentence.

*Id.* at 888. Finally, Juror James Hix confirmed the importance the issue of parole played in the sentencing decision:

> One of the things I and the other jurors were especially concerned about was the possibility that Mr. Ward might get out of prison someday and commit another violent crime. We just didn't think that a life sentence truly meant life, and that he would eventually get out of prison. If we had had the option of life without the possibility of parole as a sentence, I would have seriously considered a life sentence.

*Id.* at 885-86. It is clear that "the jury questioned a bailiff about the possibility of sentencing

Ward to life without parole, and that the answer was not given in open court." App. at 63.

**2. Hall's Multiple Opportunities to Present Evidence.**

Initially, the state habeas court agreed with Hall that juror affidavits could not be considered under a Georgia statute precluding jurors from impeaching a verdict. R1-6, Exh. 59 at 23-24.[3] Hall later noted that he had subpoenaed jurors to rebut Ward's evidence and he asked for the opportunity to proffer their testimony in case Ward challenged the state habeas court's admissibility ruling on appeal. *Id.*, at 34-37. The state habeas court acquiesced to Hall's suggestion that Ward not be permitted to even proffer his affidavits, thereby obviating the need for Hall to submit rebuttal evidence. *Id.* at 37.

The state habeas court later revised its ruling about evidence from jurors and at the end of the October 21, 1997 hearing admonished Hall that he had until December 1, 1997 to submit affidavits from jurors. R1-6, Exh. 63 at 696. Hall responded by asking that he be allowed to call jurors at the upcoming December 22nd hearing on Ward's *Brady v. Maryland* claims. In the alternative, Hall requested permission to depose jurors. *Id.* at 697. The state habeas court, at that time, declined to hear live testimony from the jurors but ruled, "***depositions or affidavits. It's up to you.***" *Id.* at 698 (emphasis added).

Prior to the December 22, 1997 hearing, the issue of testimony from jurors was revisited. The state habeas court had decided, "in an abundance of caution," to allow Hall to bring in jurors for live testimony. R1-6, Exh. 64 at 703. Later, but before December 22nd, the state habeas court

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[3]The court also believed that the affidavits were not relevant. Regarding the bailiff-jury contact, the court stated: "the discussion with the Bailiff, as stated by the jurors, is not the sort that – perhaps it should have been reported to the judge, and then from the judge to the lawyers, but the deputy's response was a proper response, and no harm done." R1-6, Exh. 59 at 24.

reverted to its earlier decision not to consider Ward's affidavits. It nevertheless ruled that Hall could attempt to rebut Ward's allegations by submitting "affidavits also not to be considered, but put in as part of the record." *Id.* Hall was charged with contacting the subpoenaed parties to inform them that their live testimony would not be needed. *Id.* Because Hall was unable to reach Juror Dunsmore before the hearing, the state habeas court ruled "rather than just have him sign an affidavit and turn around and go home," the court would allow Hall to ask Dunsmore under oath "basically the same questions that would appear on the affidavit . . .." *Id.* at 703-04.[4]

Although Hall had missed the deadline for submitting rebuttal affidavits or depositions, the habeas court stated that it would nevertheless allow them in the record if they were received by the court "soon." *Id.* at 705. When extending the deadline, the habeas court explained that any juror affidavits would not "be part of the record I'm going to review, it is only to be there in the record in case at some later date an appellate court thinks it needs to have those." *Id.* Before Dunsmore testified, the habeas court reiterated that no juror statements would be considered in ruling on Ward's habeas petition:

> [N]one of these affidavits, I want to make it clear, either [Ward's] or [Hall's] or the testimony that we are about to take under oath, are going to be considered by me at this point.

*Id.* at 707; *see also id.* at 707-08 (the juror-related evidence "will be part of the record, not that I'm going to consider, but will be part of the record kept by the Court Reporter.") Ward's juror affidavits were then placed into the record.

When Dunsmore testified, he was asked about the statement in his declaration about the

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[4]Hall had subpoenaed three of the bailiffs along with the three jurors who had provided affidavits to Ward. R1-6, Exh. 64 at 706. Juror Craig arrived prior to the hearing and was told by Hall that he was not needed to testify. *Id.* at 705–06.

jurors asking the bailiff whether Ward could be sentenced to life imprisonment without the possibility of parole. He responded that he could no longer recall whether the bailiff was asked the parole question or whether the question was posed to fellow jurors. *Id.* at 721 and 723. Although Dunsmore also could not recall if he was the one who specifically asked about parole options, he did remember that the jurors discussed the issue and "found out that we couldn't do it, as a jury we couldn't do it." *Id.* at 722-23. Regarding asking questions of the bailiffs, Dunsmore recalled that the bailiffs would leave the room with the question instead of attempting to answer it themselves. *Id.* at 723. At the time of the hearing, Dunsmore recalled only one specific occasion where a question was given to a bailiff although he thought there could have been a couple of others. *Id.* at 724-25. On that occasion, the jurors could see the bailiffs take the question to the judge's chambers. When they returned, they informed the jurors that the response was from the judge. *Id.*[5]

### 3. The State Habeas Court's Ruling – Evidence Excluded.

In its August 27, 1998 order denying Ward's habeas petition, the state habeas court ruled that the bailiff-jury misconduct claim was procedurally barred because Ward had failed to raise the issue on direct appeal. App. 175. The habeas court did not address whether Ward had established cause for his default, instead ruling that Ward did not show prejudice as needed to overcome the bar. This finding of no prejudice included no analysis. *Id.* The habeas court also

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[5]The record shows that the jury made several requests during deliberations that were relayed to the trial court and discussed with counsel prior to the trial court acting on the requests. R1-30 at 4841 (juror requests latex gloves); R1-30 at 4855 (jury requests a tape recorder); R1-30 at 4857-60 (jury requests definition of malice.) It was only when the trial court answered the malice inquiry that the jurors were brought into open court for the response.

found, again without explanation, that Ward failed to satisfy the Georgia miscarriage of justice exception to the procedural default rule. *Id.* at 175-176. On appeal, the Georgia Supreme Court remanded the case for further findings on other issues. App 162-163. On remand, the habeas court clarified its prior ruling that Ward's juror-related claims[6] had no merit. App. 166-67. It found that Ward had not met the "cause" requirement to overcome the procedural default of any of the bailiff/juror claims:

> Petitioner has failed to establish: (1) an external factor precluding Petitioner from previously raising [subclaims (a)-(c)], or (2) ineffective assistance of counsel given that Petitioner has not established the "cause" to overcome the procedural default of this claim as he has failed . . . to establish that the bailiffs engaged in any conduct that resulted in "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Turpin v. Todd*, 268 Ga. 820, 828 (1997). There is no affirmative evidence that the bailiff oath was not taken, that there was any question posed by the jury that was not answered by the trial court in open court, and no evidence to support Petitioner's allegation that a fifth question was asked about parole eligibility and not relayed to the trial judge.

*Id.* The Georgia Supreme Court denied Ward's application to appeal this ruling.

### C. The Eleventh Circuit's Decision.

Ward filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Georgia alleging multiple claims for relief. After his petition was denied, he appealed. The Eleventh Circuit affirmed the denial of relief on all but the juror/bailiff misconduct claim.

As for that claim, the Eleventh Circuit rejected Ward's argument that the state procedural

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[6]There were three claims related to misconduct or error concerning the jurors and/or bailiffs. Subpart (c) is the claim on which the Eleventh Circuit found Ward entitled to habeas relief. Subparts (a) and (b) involved the familiarity between the bailiffs and jurors and a failure to administer and comply with the bailiff oath. Subparts (a) and (b) are not at issue here.

bar was not adequate to preclude federal habeas review. App. at 60-61. The appeals court found, however, that Ward had demonstrated "cause" to overcome the procedural default. App. at 62. It ruled that there was an external impediment that impeded Ward from raising the claim during the direct appeal – "the failure of the bailiff and/or the trial judge to inform Ward or his counsel about the jury's question concerning parole." *Id.*

Regarding the state habeas court's finding that there was no evidence that the jury asked any question that was not answered by the trial court in open court, the Eleventh Circuit held that this finding was rebutted by clear and convincing evidence, i.e., the juror affidavits and Dunsmore's testimony. App. at 63-64. The appeals court also found that the state habeas court's refusal to consider Ward's juror evidence was erroneous in light of Georgia Supreme Court precedent. App. at 65.

Turning to the prejudice prong of the "cause and prejudice" exception to the procedural default doctrine, the Eleventh Circuit ruled that Ward met the test of *United States v. Frady*, 456 U.S. 152, 170 (1982). In reaching this conclusion, the appeals court noted how important the question of parole was to at least three of the jurors, how the bailiff's answer to the jurors necessarily reinforced a preexisting belief that Ward would be paroled at some future time, the fact that parole eligibility was not a proper consideration under state law, and that only a single vote in favor of life imprisonment was needed to avoid the death penalty. App. at 67-71.

Having overcome the procedural bar, the Eleventh Circuit lastly ruled that Ward was entitled to relief on the merits of his claim. It reached this conclusion after considering the nature of the extrinsic evidence, the manner in which the extrinsic evidence reached the jury, and the strength of the government's case. App. at 72. As for the last factor, the appeals court noted the

circumstantial nature of the case against Ward, the doubts about Ward's guilt expressed by some of the jurors, and the jury's rejection of the aggravating factor of an outrageously or wantonly vile murder. App. at 72-73.

## REASONS FOR DENYING THE PETITION

### I. Hall Invents Factual Findings Not Made By the State Habeas Court and Omits Reference to His Multiple Opportunities to Develop the Record in State Court.

#### A. No Findings Can Be Made When No Evidence is Considered.

Hall complains that the Eleventh Circuit failed to consider that Ward did not overcome by clear and convincing evidence the state habeas court's finding "that the trial court, via the bailiff, informed the jury that they were to rely on the trial court's proper instructions, which was not an improper procedure under Georgia law." Cert. Pet. at 9; *see also Id.*, at 10 ("the Eleventh Circuit erred in not presuming, as found by the state habeas court, that the trial court, through the bailiff, answered any question posed by the jury concerning the possibility of parole."); *id.*, at 14 ("Eleventh Circuit failed to give the mandated presumption under § 2254(e)(1) to the state habeas court's factual finding that the trial court properly answered any question by the jury concerning parole.") Hall's argument is specious on several levels.

First, the assertion that there were such findings by the state court is inconsistent with Hall's admission that 28 U.S.C. § 2254(d) is inapplicable because the bailiff/juror misconduct claim was not "adjudicated on the merits." Cert. Pet. at 10.

Second, the record conclusively establishes that the state habeas court never made any findings. The state habeas court could not have been clearer that it was not going to review or consider any of Ward's juror affidavits, the testimony of Juror Dunsmore, or any counter

depositions or affidavits submitted by Hall. Indeed, Hall repeatedly acknowledges the state habeas court's steadfast refusal to consider the evidence.[7] Despite this acknowledgment, Hall manufactures a factual finding purportedly made by the state court based on evidence it would not consider. The Eleventh Circuit cannot be criticized for withholding deference to a nonexistent finding.

Third, because the state habeas court refused to consider the pertinent evidence it is unsurprising that it wrote that there was "no evidence that there was any question posed by the jury that was not answered by the trial court in open court, and no evidence to support [Ward's] allegation that a fifth question was asked about parole eligibility and not relayed to the trial judge." App. at 167. Hall surprisingly attempts to support this with the very evidence the state habeas court ruled it would not consider. *See* Cert. Pet. at 8-9 (the above finding was supported by "evidence that showed that the bailiff took the jurors' question to the judge for the judge's response. The bailiff then returned from the judge to give the judge's response that the jury had to proceed with the instructions previously given to them by the trial court . . ."). In addition to being nonsensical, the evidence that was not considered by the state court simply does not show what Hall contends it does.

For example, Hall's rendition of what occurred ignores Craig's affidavit in which he

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[7] *See* Cert. Pet. at 5 ("The Eleventh Circuit relied . . . on testimony that was not allowed in the state courts"); *Id.* at 6 (Eleventh Circuit based its prejudice determination on testimony of three jurors which was "not in evidence before the state habeas court"); *id.* at 12 (Eleventh Circuit relied on "the affidavits and testimony of the jurors that were not admitted"); *id.* at 15 ("the state habeas court held that it was not admitting into evidence or considering the testimony of jurors for its review"); *id.* at 20 (Eleventh Circuit's findings were "based on testimony that was not admitted in the state court proceedings"); Cert. Pet. at 20 ("the state habeas court made it clear that it was not considering jury testimony on the issue.)

stated that the bailiff refused to convey the parole question to the trial judge. And while Dunsmore's affidavit recounted the bailiff being asked about parole and returning with an answer to the question, at the hearing he could not recall whether the question about parole was actually asked of the bailiff or was brought up by a fellow juror. Although he could recall one specific instance where a jury question was presented to the judge, this recollection was never tied to the parole question. Hall is incorrect when he claims that Dunsmore "could recall the jury asking *only this one question*." Cert. Pet. at 10 (emphasis in original).

Hall's contention that "the reasonable conclusion" is that the parole question was taken to the trial judge and answered by the court is further undermined by the absence of any evidence in the trial record of the question. There is, of course, a presumption that the trial court would have acted appropriately upon receipt of such a question, "i.e., [it] would have put the inquiry on the record, consulted with counsel, formulated a *Quick* [*v. State*] response, and personally conveyed that response to the jury in the courtroom" *Turpin v. Todd*, 519 S.E.2d 678, 681 n.2.[8] That the trial court responded appropriately to other jury questions is additional rebuttal to Hall's version of events. Hall essentially asks this Court to presume that the trial court disregarded its duty of notifying opposing counsel of the jury's query, as well as of the trial court's proposed response,

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[8]Under state law at the relevant time, if jurors asked about parole during a capital trial the trial courts were to respond as follows:

> You shall not consider the question of parole. Your deliberations must be limited to whether this defendant shall be sentenced to death or whether he shall be sentenced to life in prison. You should assume that your sentence, whatever it may be, will be carried out.

*Quick v. State*, 353 S.E.2d 497, 503 n. 3 (Ga. 1987). This rule changed after Georgia adopted a third possible sentence in capital cases – life imprisonment without the possibility of parole.

and instead provided the jury with a secret and legally inappropriate answer. There is no basis for such a presumption.

**B. Hall Declined to Present Evidence in State Court.**

Hall also accuses the Eleventh Circuit of disregarding "the fact that the state habeas court had not allowed development of the claim by either party." Cert. Pet. at 3-4.[9] The state court record is clear, however, that Hall was well aware of the need to submit any rebuttal evidence he could develop to counter Ward's affidavits and the testimony of Dunsmore. And although Hall did submit affidavits following the December 22, 1997 hearing to counter Ward's *Brady* claim (*see* R1-6, Exh. 66 at 1303-1310), notably he presented nothing to refute Ward's evidence of juror/bailiff misconduct. Given that the state habeas court authorized Hall to conduct depositions of the jurors, as well as to proffer affidavits from them in case the state habeas court's admissibility ruling was overturned on appeal, Hall's contention that the state habeas court's refusal to consider Ward's evidence left him with no evidence to rebut (Cert. Pet. at 20) is simply untrue.

**II. Hall Misstates Georgia Law and Presents No Issue Worthy of Certiorari.**

Although Hall does summarily assert that the jury/bailiff evidence was "not admissible," (Cert. Pet. at 6), he does not defend the state habeas court's admissibility ruling which the Eleventh Circuit correctly found was contrary to Georgia law. App. at 65-66. Hall does take

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[9] *See also* Cert. Pet. at 5 ("[t]he Eleventh Circuit relied on an undeveloped record"); *id.* at 6 (Eleventh Circuit decided claim "on a record that had not been developed in the Court below."); *id.* at 9 ("Disregarding the fact that the record was undeveloped on the issue and that the state habeas court had refused to allow development of the issue . . .."); *id.* at 12 (record "is undeveloped on exactly what the jurors were told."); *id.* at 15 (Eleventh Circuit relied on "undeveloped testimony"); *id.* at 20 (Eleventh Circuit relied on "undeveloped evidence"); *id.* at 21 (asking this Court for a remand "for further development of the facts").

issue, however, with the Eleventh Circuit's reading of Georgia law regarding the appropriate response to jury questions about the possibility of parole in capital cases arising before Georgia adopted a life without parole sentencing option. According to Hall, under "well-substantiated Georgia law . . . it is not harmful error, or even a jury charge, if the bailiff under instruction of the trial court merely informs the jury that they must proceed under the instructions previously given by the trial court." Cert. Pet. at 11-12. As set forth above, there is no finding that the trial court answered the jury's question about parole through the bailiff. In addition, the cases cited by Hall do not support his position.

The Georgia Supreme Court in *Quick* announced a rule requiring a specific response to questions about parole in capital cases:

> You shall not consider the question of parole. Your deliberations must be limited to whether this defendant shall be sentenced to death or whether he shall be sentenced to life in prison. You should assume that your sentence, whatever it may be, will be carried out.

*Quick*, 353 S.E.2d at 503 n. 3 (Ga. 1987). It is undisputed that Ward's jury was not provided such an instruction following the query about whether Ward could be paroled. Hall's citation to *Quick* (Cert. Pet. at 12) as supporting authority is mysterious. So too is Hall's reliance on *Todd*, 519 S.E.2d at 683. Although the Georgia Supreme Court did note there that it is generally harmless error where a bailiff simply repeats what a trial court has instructed the bailiff to tell the jury in response to a jury question, the Georgia Supreme Court cited to *Hollis v. State*, 382 S.E.2d 145 (Ga. 1989). *Hollis* was a non-capital case where the trial court informed the parties about a jury query and developed a response that the parties agreed to. Even assuming that the trial court in this case provided an answer to the jury's parole question, an assumption not

supported by the record, defense counsel was not given the opportunity to request that the jury be given the *Quick* admonition as mandated by state law.[10]

Hall not only contends that the Eleventh Circuit misconstrued state law, but also complains about the Eleventh Circuit's "fail[ure] to give the mandated presumption under § 2254(e)(1) to the state habeas court's factual findings that the trial court properly answered any question by the jury concerning parole." Cert. Pet. at 14-15. Again, the state habeas court never made a factual finding that the trial court answered the jurors' question. Nor, necessarily, did it find that any such answer was proper under state law. But even if the state habeas court had made a finding that it was proper under Georgia law to refer the jurors to their original instructions, this is a legal, not a factual, finding and § 2254(e)(1) has no application.

Finally, even if Georgia law permitted trial courts to refuse to address parole-related questions in capital cases, which it did not at the relevant time, this would not be the end of the matter. It would violate due process and the Eighth Amendment to preclude a defendant from presenting evidence or argument about the possibility of parole while at the same time allowing

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[10]In *Potts v. State*, 410 S.E.2d 89, 97 (Ga. 1991), another case cited by Hall (Cert. Pet. at 12 and 13), the Georgia Supreme Court found no reversible error where the trial court declined to answer the jury's question about the possibility of parole. The opinion is silent, however, regarding whether a *Quick* admonition had been requested by trial counsel after being properly informed of the jury question. Because Ward's attorney was not notified about the question he was denied his right to participate "in the trial court's formulation of a response to a jury inquiry." *Turpin v. Todd*, 519 S.E.2d 678, 683 (Ga. 1999). In *Cohen v. State*, 361 S.E.2d 373, 375 (Ga. 1997), again there was no indication in the record whether trial counsel had requested an answer on the parole issue. Further, because the trial in *Cohen* was before *Quick* was decided, it is not surprising that the trial court was not reversed for failing to admonish the jury as was later required by *Quick*. *See also Childs v. State*, 357 S.E.2d 48, 60-61 (Ga. 1987) (decision silent on defense counsel's response to jury inquiry in pre-*Quick* trial); *Berryhill v. State*, 221 S.E.2d 185, 189 (Ga. 1975) (pre-*Quick* decision); *Thacker v. State*, 173 S.E.2d 186, 193-94 (Ga. 1970) (same).

the jury to base its sentence on pure speculation about future release. *See, e.g., Simmons v. South Carolina*, 512 U.S. 154 (1994) (holding it is unconstitutional for a defendant to receive a death penalty on the basis of information which he had no opportunity to deny or explain.); App 70 (Eleventh Circuit recognizing Ward's constitutional right "to be sentenced by jurors who are free from external influence and who render their verdict solely on the basis of the evidence presented during trial.") Thus, any misconception by the Eleventh Circuit about state law would neither justify certiorari review nor change the result below.

## III. Hall's Complaints About the Eleventh Circuit's Application of *Frady* Provide No Basis for Granting the Petition.

Hall contends that the Eleventh Circuit "improperly concluded that [Ward] had established cause and prejudice to overcome his default of his juror/bailiff misconduct claim." Pet. Cert. at 6. In particular, Hall complains about the Eleventh Circuit's prejudice analysis under *United States v. Frady*. Cert. Pet. at 18-19. The *Frady* complaint does not provide a basis for certiorari review. *Frady* should not have been at issue because the Eleventh Circuit erred in finding that the state procedural bar was adequate under this Court's procedural default jurisprudence. And there was nothing inappropriate in the circuit court's application of *Frady*.

### A. Georgia's Requirement That Any Alleged Error Be Raised On Direct Appeal Was Applied in a Novel Manner Given Existing Precedent at the Time of Ward's Direct Appeal; Ward Would Be Entitled to Relief Regardless of the Lower Court's *Frady* Analysis.

At the time of Ward's trial and direct appeal, O.S.G.A. § 9-14-48(d) had been construed to bar in habeas proceedings only those claims that were clear on the appellate record but had not been raised on direct appeal. Ward followed existing law and made only arguments on direct

appeal that were based on the trial record. It was not until five years after Ward's conviction and sentence were affirmed that the Georgia Supreme Court ruled for the first time in *Turpin v. Todd*, 493 S.E.2d 900, 905 (Ga. 1997), that § 9-14-48(d) applied to issues not appearing in the record on appeal, such as a claim of jury misconduct.[11] Ward was therefore deprived of notice that he needed to investigate whether any bailiff/jury misconduct occurred prior to the direct appeal.[12]

Because the state habeas court's application of § 9-14-48(d) to the juror/bailiff misconduct claim in this case was novel, the rule was not adequate for purposes of precluding federal habeas review. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958) (novelty in procedural requirements cannot be permitted to thwart federal review). Had the Eleventh Circuit properly addressed the procedural default question, a cause and prejudice

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[11]The Georgia Supreme Court went on to find, however, that in such a situation the petitioner had cause to overcome the default because the bailiff concealed the factual basis of the claim from the petitioner and the petitioner had no reason to believe the misconduct had occurred during the course of the direct appeal. *Turpin v. Todd*, 493 S.E.2d at 907. Thus, contrary to the state habeas court's finding that Ward had not show cause for his failure to raise the misconduct on direct appeal, the Georgia Supreme Court has found cause in the exact same situation. Where a state court finds a petitioner has justification for not complying with a procedural rule, such noncompliance cannot be a basis for withholding federal habeas review. *See, e.g., Cone v. Bell*, 129 S.Ct. 1769, 1782 (2009) (when a state court declines to find that a claim has been waived by a petitioner's alleged failure to comply with state procedural rules, federal review is not precluded).

[12]The Warden does suggest that the misconduct claim had been available to Ward on direct appeal because trial counsel had spoken with some jurors following the trial. Cert. Pet. at 8. As trial counsel explained, some jurors contacted him after trial because they wanted to talk about the emotional experience they shared. R1-6 ex 62 at 404-05. The record is devoid of evidence, however, that trial counsel learned of the misconduct during such conversations with jurors. Notably, the Warden was provided with trial counsel's files during the state court proceedings. R1-6 ex 59 at 73. Had there been any indication in the files that trial counsel had discovered the misconduct, surely Hall or Ward would have brought that out either by offering trial counsel's notes in evidence or, at the least, questioning trial counsel about his conversation with one or more jurors during the habeas hearing.

analysis would not have been required and *Frady* would have been inapplicable.

### B. The Eleventh Circuit's *Frady*-Prejudice Analysis Did Not Violate This Court's Precedent or Conflict With That of Other Circuit Courts.

Under *Frady*, the question is whether the error worked to the petitioner's actual and substantial disadvantage. *United States v. Frady*, 456 U.S. at 170.

In determining whether Ward established actual prejudice under *Frady*, the Eleventh Circuit observed that at least three jurors expressed concern about whether Ward would be released on parole if he were sentenced to life imprisonment. App. at 67. Their concern was significant enough that a bailiff was asked if Ward could be sentenced to life imprisonment without the possibility of parole. *Id.* at 68. At least one juror was informed by the bailiff that such a sentence was not an option. *Id.* The jury was left with the impression that Ward could or would be released if he was sentenced to life imprisonment.

The Eleventh Circuit found that the bailiff's response to Juror Craig reinforced his belief and that of other jurors that Ward would be paroled after a while. *Id.* The Eleventh Circuit concluded that the issue of parole was not only considered, but was a key factor to the sentencing decision of at least three jurors. *Id.* And although the bailiff's response was technically correct, the Eleventh Circuit noted that the Georgia Board of Pardons and Parole had the discretion to deny parole, a fact not conveyed to the jury. *Id.* at 69 n. 21. More importantly, the Eleventh Circuit pointed out that parole was a subject that was not permitted to play a role in capital sentencing under Georgia law. *Id.* at 70. Where a question about parole was raised, Georgia law required that the jury be told "in no uncertain terms" that parole was not to be a consideration.

On the record before it, the Eleventh Circuit concluded:

> Bearing in mind that only one vote in favor of life imprisonment was needed to avoid a death sentence, we conclude that there is a substantial likelihood that the jury would not have returned a death verdict had the trial court, in lieu of the bailiff's response, properly instructed the jury in open court not to consider parole.

*Id.*

In his certiorari petition, Hall correctly points out that jurors are generally precluded from testifying about how an extraneous influence operated on his or her mind. Cert. Pet. at 16. This is precisely why there is a certain amount of speculation involved in the prejudice inquiry whenever there is a claim of juror misconduct. Here, neither Ward nor Hall could have asked the jurors the definitive question establishing whether Ward was prejudiced by the misconduct: had you been instructed that the possibility of parole was not to be considered when determining Ward's sentence, would you still have returned a sentence of death? Because this question naturally cannot be asked, a reviewing court is left with whatever objective indicia is available in determining if actual prejudice occurred.

While Hall chastises the appeals court for improperly relying on the "inadmissible thought processes" of some jurors (Cert. Pet. at 15), he fails to specify where in the Eleventh Circuit's decision such error occurred. In this case, consideration of whether the question of parole was a fleeting concern to the jury or whether it constituted a major issue in the sentencing decision was entirely proper.[13] There was nothing in the Eleventh Circuit's analysis that was inconsistent with *Frady*.

Although the heading used by Hall implies that improper use of juror thought processes is

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[13]Similarly, it was not improper for the Eleventh Circuit, when deciding whether habeas relief was warranted, to take into account that the record provided a basis for defense counsel's residual doubt argument and that the argument had some resonance with the jury. App. at 73.

where the Eleventh Circuit went astray under *Frady*, the body of the argument is simply a recapitulation of Hall's baseless contentions that: (1) it was somehow error for the appeals court to rely on evidence that the state habeas court refused to consider; and (2) Dunsmore's testimony established that the trial court answered the jury, and did so in accordance with state law. Hall attempts to elevate the importance of this case by asserting:

> [T]he Eleventh Circuit's reasoning would require reversal in every case in which a juror asked a question of fact or law not in record (sic) in the jury room or to the trial court, even if the juror was properly informed or instructed it could not consider that fact or law.

Cert. Pet. at 19. Here, of course, the prejudice finding was premised on the fact that the jury was *not* informed or instructed that it could not consider the possibility of parole when determining the sentence. Hall has identified nothing in the Eleventh Circuit's analysis warranting certiorari review by this Court.

## CONCLUSION

The Eleventh Circuit's decision is unremarkable and Petitioner Hall has failed to provide adequate reasons for this Court to grant his certiorari petition. The petition should therefore be denied.

Dated this 28th day of October, 2010.

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ATTORNEYS FOR APPELLANT

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

October Term, 2010

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10-288

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**JAMES RAY WARD,**
*Petitioner,*

**versus,**

**STEVEN UPTON, WARDEN,**
*Respondent.*

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*On Petition for Writ of Certiorari*
*To the United States Court of Appeals for the Eleventh Circuit*

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*CERTIFICATE OF SERVICE*

I hereby certify that I served a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon counsel for petitioner by depositing a copy of same in the U.S. mail, with proper postage affixed thereto, addressed to:

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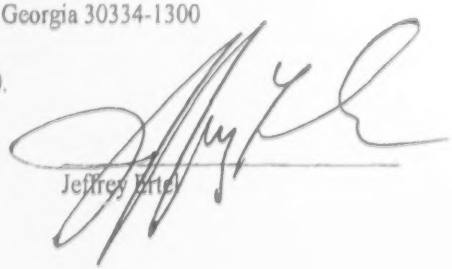
This 28th day of October, 2010.



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